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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

JACQUELINE MONTANEZ,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District, Second Division

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under this Court's *Miranda* jurisprudence, the failure to provide a juvenile defendant with preconfession counselling with a parent or concerned adult renders the resulting confession *per se* involuntary.

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OPINION BELOW

The opinion of the Illinois Appellate Court, First District, Second Division is reported at 273 Ill. App. 3d 844, 652 N.E.2d 1271 (1995), and a copy is attached as Appendix A. The order of the Illinois Supreme Court denying the People's Petition for Leave to Appeal is attached as Appendix B.

STATEMENT OF JURISDICTION

The decision of the Illinois Appellate Court, First District, Second Division was entered on June 30, 1995. The People's Petition for Leave to Appeal to the Illinois

Supreme Court was timely filed on July 10, 1995 and denied by that Court on December 6, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

MANNER IN WHICH THE FEDERAL CONSTITUTIONAL CLAIM WAS RAISED

Respondent moved in the state trial court to suppress her murder confession, alleging, *inter alia*, that her confession was obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The trial judge denied the motion, ruling the confession voluntary and admissible. The Appellate Court of Illinois reversed that ruling, finding the confession involuntary. Because the appellate court decided a federal constitutional claim, and its opinion contains no "plain statement" of state law grounds, this Court has jurisdiction to review the decision. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); See Reasons For Allowing The Writ, Section II.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The fifteen year old minor respondent, Jacqueline Montanez[1], was charged by indictment for the execution-style first degree murders of rival gang members, Hector Reyes and Jimmy Cruz. (R.C. 15-18) The evidence at trial established that these murders were committed in retaliation for an earlier murder of respondent's fellow gang member, believed to be committed by the victims' gang. (Vol. III D80, D85, D118) Because respondent was fifteen and charged with first degree murder, respondent was automatically prosecuted as an adult, pursuant to Section 5-4 of Illinois' Juvenile Court Act of 1987. 705 ILCS 405/5-4. After a jury trial, respondent was found guilty of both counts of first degree murder and sentenced to mandatory natural life imprisonment. (R.C. 67, 68, 81; Vol III F15)

Prior to trial, respondent sought to suppress the three statements she made while in the custody of the Chicago Police Department on several grounds that allegedly rendered these statements involuntary. (R.C. 41-43) A hearing on respondent's motion to suppress was held, at which the following evidence was adduced:[2]

Sometime between 11 p.m. on May 11, 1992, and 1:00 a.m. on May 12, 1992, respondent, a self-described chief

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[1] Respondent was charged with two other co-defendants and all three were tried, in separate trials, on theories of accountability.

[2] Because, under Illinois law, evidence adduced both at a motion to suppress and at trial can be utilized to assess the propriety of a trial court's ruling on a motion to suppress (*People v. Caballero*, 102 Ill. 2d 23, 464 N.E.2d 223 (1984)), this statement of facts will recount the pertinent evidence from both the suppression hearing and trial.

of the Maniac Latin Disciples street gang (Vol. III E89-92), and two of her female gang underlings, lured the two victims into a city park and shot them in the backs of their heads at close range. The victims were chosen simply because they were members of a rival gang, the Latin Kings. (Vol. III D85-87, D118-128, E27-37)

The next day, May 13, 1992, at approximately 9:00 p.m., respondent was arrested[3] for these murders by Chicago Police Detectives Halvorsen and Guevera. (Vol. II A3-4; Vol. III D78-82) Respondent was transported to the police station and, over the course of less than eight hours, was interviewed three times and gave three substantially similar incriminating statements. (Vol. II A5-15, A29-34, A40-46; Vol. III D85-87, D88, D113-128)

It is undisputed that respondent was *Mirandized* prior to each statement. (Vol. II A6, A8-10, A12, A29, A31, A40-42) At no time did respondent indicate that she desired to exercise her right to remain silent or to consult with an attorney in response to these warnings. Respondent was a high school sophomore at the time of her confession and neither the trial court nor the appellate court found that respondent was not given or did not comprehend these warnings. (Vol. III D128, Supp. R. A9) There is no evidence that respondent was physically or psychologically coerced into making the statements.[4] Respon-

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[3] There is no issue regarding the propriety of respondent's arrest. Respondent was properly arrested on the street. Therefore, respondent's transportation to the police station and in-custody interviews were undertaken pursuant to lawful arrest.

[4] Respondent contended in her motion that she was under the influence of drugs and alcohol when she made the statements and introduced the testimony of her mother in this regard at

(continued...)

dent herself acknowledged that she had been treated well, had been fed and had not been promised anything or threatened. (Vol. III D127-128) Although respondent was informed that her mother had been contacted, at no time did respondent request to see or speak with her mother. (Vol. II A30)

Respondent gave an oral statement, her first, at approximately 10:00 p.m. in the presence of Detectives Halvorsen and Guevera. (Vol. II A7-10) Prior to making this statement, respondent was informed that she could be charged as an adult. (Vol. II A5-6) Despite Detective Halvorsen's best efforts to secure a Youth Officer to confer with respondent, none were available until the midnight shift. (Vol. II A19-20) Moreover, a squad car was dispatched to respondent's home to notify her parents that respondent was in custody. (Vol. II A6-7, A23, A25; Vol. III D94) Sometime around midnight, Detective Guevera indicated that he spoke to respondent's mother by telephone and she indicated that "she would get there as soon as she could" or that she "may come down." (Vol. II A7, A23, A26, A37-38, A39-40, A48; Vol. III D136)

Respondent gave a second oral statement at approximately 1:15 a.m. and a third, written, statement at

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[4] (...continued)
the hearing. (Vol. II A63-64; Vol. III E57) However, the prosecution witnesses all consistently testified to the contrary. (Vol. II A17, A35, A47) Moreover, the prosecution introduced a news videotape of respondent, taken between 9:00 and 9:30 a.m. The trial court and the jury were, thus, able to assess respondent's condition for themselves. (Vol. III E9-10, E15) The trial court specifically rejected this claim in ruling on respondent's motion to suppress. (Supp. Vol. A9) More importantly, the appellate court majority did not at all base its finding of involuntariness upon this allegation.

approximately 5:15 a.m. (Vol. II A12, A14-15, A31-32, A33, A40-46) Youth Officer Pulia, who explained to respondent that he was there to protect her rights and to see how the police officers had treated her (Vol. II A29), was present for the second and third interviews. (Vol. II A31-A35) Significantly, Youth Officer Pulia informed respondent prior to the second interview that her mother had been contacted. (Vol. II A29, A30, A36, A38)

Respondent's mother was allowed to confer with respondent alone in an interview room at approximately 8:30 a.m. (Vol. II A62-63; Vol. III E54) The prosecution introduced a videotape of a television news cameraman, who captured respondent on film as she was leaving an interview room sometime between 9:00 and 9:30 a.m. (Vol. III E9, E15) In the videotape, respondent makes reference to her gang, flashes her gang sign and says "K.K," meaning King Killer. (Vol. III E9-10) A gang crimes officer explained that the term "K.K." indicates that a function of defendant's gang "is to kill members of the Latin King Street Gang," the gang to which the two victims belonged. (Vol. III E7)

Defendant's mother, Sandra Lorenzi, however, testified[5] that, at approximately 10:00 or 10:15 p.m., two plain-clothed detectives came to her home and informed her that respondent had been a witness to a murder. (Vol. II A55-59; Vol. III 48) They later informed Ms. Lorenzi that respondent was "involved in a murder."

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[5] Contrary to the factual findings made by the trial court, the majority found the testimony of respondent's mother to be "uncontradicted" and relied upon her testimony in finding respondent's statements to be involuntary. Therefore, for purposes of this Petition alone, the People will not contest these findings.

(Vol. II A57-59, A60-62) One of the detectives informed Ms. Lorenzi of respondent's location and said that he would call her when she could see respondent. (Vol. II A59)

Because she had not yet received a call, Ms. Lorenzi and her girlfriend went to the police station at approximately 2:00 a.m. (Vol. II A59-60; Vol. III 48-49) Ms. Lorenzi made several unsuccessful attempts to see and speak with her daughter. Each time, she was not permitted access to respondent. (Vol. II 60-62; Vol. III E52-53) Ms. Lorenzi and her girlfriend were ultimately permitted to confer with respondent alone in an interview room, at approximately 8:30 a.m., after respondent had made her third and final statement. (Vol. II A62-63; Vol. III E54)

After a hearing, the trial court denied respondent's motion, finding that the statements were voluntary. (Supp. R. A9) Notably, the trial court found that there "is an indication [that respondent] is a little more sophisticated than an average 15-year-old." (Supp. R. A8-9)

Over a vehement dissent, a majority of the Illinois Appellate Court reversed the trial court's ruling. The majority based its finding on the grounds that respondent's mother, "a concerned adult," was not permitted an opportunity to confer with respondent prior to her confession. The majority found that respondent, "a juvenile defendant, age 15, was interrogated throughout the night as part of a pattern of police conduct designed to elicit a confession, as well as to obstruct parental counselling." 273 Ill. App. 3d at 855. The majority thus concluded that respondent's confession was involuntary.

The dissent pointed out that, in fact, the majority had found respondent's confession to be *per se* involuntary on the sole ground that her mother was not permitted to

confer with respondent. 273 Ill. App. 3d at 859. The dissent notes that the only other grounds relied upon by the majority was that respondent "was interrogated throughout the night as part of a pattern of police conduct designed to elicit a confession." 273 Ill. App. 3d at 859, n. 2. The dissent aptly points out that this conclusion "is not supported by the record and is contrary to the trial judge's findings." 273 Ill. App. 3d at 859, n. 2. The dissent charged that the majority merely applied a "*per se* rule bolstered by conclusional statements designed to comply with the totality of the circumstances test." 273 Ill. App. 3d at 859, n. 2. In essence, the majority found the confession involuntary solely on the ground that respondent's mother was denied access to respondent prior to her confession.

REASONS FOR ALLOWING THE WRIT

I.

ENGRAFTING THE *PER SE* REQUIREMENT OF PRE-CONFESSION COUNSELLING WITH A "CONCERNED ADULT" OR PARENT PRIOR TO IN-CUSTODY INTERROGATION OF A JUVENILE ONTO THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WOULD NEEDLESSLY UPSET THE DELICATELY DRAWN BALANCE OF THE *MIRANDA* DOCTRINE.

Subsequent to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and its progeny, this Court has never addressed the precise parameters of, and requirements for, in-custody questioning involving juvenile offenders. Both the instant majority and dissenting opinions of the Illinois Appellate Court are representative of the widely disparate approaches state courts

throughout the nation are taking when presented with this issue. Many States themselves have statutorily addressed the issue—oftentimes in an effort to anticipate what this Court would hold should it ever address itself to this increasingly common situation. Moreover, precisely because this Court has never given its guidance on this issue, it is impossible to ascertain whether the various State approaches to this conundrum are even in compliance with the dictates of the Fifth Amendment of the United States Constitution. Quite simply, law enforcement personnel, state courts and state legislatures throughout this nation have been given no guidance whatsoever from this Court on the constitutional requisites when a juvenile is subjected to in-custody interrogation. The instant cause now affords this Court an opportunity.

A. Under This Court's *Miranda* Jurisprudence, A Juvenile Defendant Is Not *Per Se* Entitled To Preconfession Counselling With A "Concerned Adult" Or Parent And Such A Requirement Would Needlessly Upset The Carefully Drawn Balance Of The *Miranda* Doctrine.

The Appellate Court of Illinois ruled that a juvenile's confession to murder was involuntary solely because the juvenile did not confer with her parent prior to confessing to law enforcement personnel. Opinions may differ on whether that decision was good public policy, but the appellate court majority was wrong to read that requirement into the Fifth Amendment. The appellate court has essentially crafted its own procedural requirement to ensure that juvenile confessions are voluntary. The appellate court has erroneously concluded that, where a juvenile does not confer with a parent or "concerned adult"

prior to in-custody interrogation, the resulting confession is *per se* involuntary and inadmissible. This mandatory procedural mechanism, however, has needlessly and disruptively upset the delicate balance drawn by this Court's *Miranda* jurisprudence.

This Court has indicated in the past that juveniles should be afforded specialized consideration in assessing the voluntariness of their confessions. The exact constitutional parameters of this specialized consideration, however, have never been delineated by this Court. More specifically, this Court has not heretofore addressed the issue upon which the majority found the instant respondent's confession involuntary. Whether a juvenile is constitutionally entitled to preconfession counselling with a parent or other "concerned adult" is an open question that should be answered by this Court.

Almost fifty years ago, this Court was called upon to assess the voluntariness of a juvenile's confession in *Haley v. Ohio*, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948). What this Court said in *Haley* has led many courts, including the instant majority, to believe that a juvenile is constitutionally entitled to the presence of a parent during in-custody interrogation. In scrutinizing the voluntariness of petitioner Haley's confession, this Court stated:

> "What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. . . . . He cannot be judged by the more exacting standards of maturity. . . . . This is the period of great instability which the crisis of adolescence produces. . . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He

> needs counsel and support if he is not to become the victim first of fear, then of panic. He needs somebody on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. . . . . No counsel or friend was called during the critical hours of questioning." *Haley,* 332 U.S. at 599-600, 68 S.Ct. at 303-304.

Similarly, in *Gallegos v. Colorado*, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962), this Court again addressed a claim that a juvenile's confession was involuntary. Notably, this Court stated that the minor petitioner:

> ". . . cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow his conviction to stand would, in effect, be to treat him as if he had no constitutional rights." *Gallegos*, 370 U.S. at 54-55, 82 S.Ct. at 1212-1213.

It is not surprising that courts and state legislatures have interpreted these passages to indicate that the presence of a "concerned adult" is constitutionally required when a juvenile is undergoing in-custody interrogation. However, it must be remembered that these cases

were decided prior to this Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This Court fashioned the now familiar prophylactic *per se* measures of the *Miranda* doctrine "to dispel the compulsion inherent in custodial surroundings." *Miranda*, 384 U.S. at 458, 86 S.Ct. at 1619. This Court emphasized a suspect's right to counsel, concluding that "the presence of counsel, * * * would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination.]" 38 U.S. at 466, 86 S.Ct. at 1623.

The role of counsel is a special one in the *Miranda* constitutional calculus. As this Court explained in *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S.Ct. 2560, 2568-2569, 61 L.Ed.2d 197 (1979), "The rule in *Miranda*, however, was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." It is precisely because of this special role that the attorney—and no one else—is afforded *per se* status in the *Miranda* equation. "It is this pivotal role of legal counsel that justifies the *per se* rule established in *Miranda*, and that distinguishes the request for counsel from the request for a probation officer, a clergyman, or a close friend." *Michael C.*, 442 U.S. at 722, 99 S.Ct. at 2570.

To additionally require that police permit parents to confer with their children prior to questioning, under pain of an automatic determination of involuntariness, would upset the carefully crafted balance this Court struck in formulating the *Miranda* doctrine. "Such an extension would impose the burdens associated with the rule of *Miranda* on the juvenile justice system and the

police without serving the interests that rule was designed simultaneously to protect." *Michael C.*, 442 U.S. at 723, 99 S.Ct. at 2571. The majority's holding in the instant cause achieves precisely this undesirable result. In essence, the majority opinion extends the *per se* aspects of the *Miranda* doctrine to include the presence of a "concerned adult" when a juvenile is undergoing in-custody interrogation. In so doing, the majority opinion has needlessly upset the carefully crafted balance this Court struck in *Miranda* and its progeny.

Moreover, the concerns that this Court has expressed with respect to in-custody interrogation of juveniles have been addressed and are already subsumed within the *Miranda* doctrine. *Miranda* looks to the totality of the circumstances to ascertain whether the arrestee has knowingly and intelligently waived his *Miranda* rights. *Moran v. Burbine*, 475 U.S. 412, 420-421, 106 S.Ct. 1135, 1140-1141, 89 L.Ed.2d 410 (1986). This analysis accounts for the particularities of the accused—including his age, maturity level, intelligence, etc. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-227, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). It is through the totality of the circumstances test that the inquiry can and already does accommodate the peculiarities of juvenile in-custody interrogation. Thus, the primary concerns of this Court in the pre-*Miranda* juvenile confession cases have been allayed by the *Miranda* doctrine. See also *In re Gault*, 387 U.S. 1, 55, 87 S.Ct. 1428, 1458, 18 L.Ed.2d 527 (1967) (privilege against self-incrimination applicable to juveniles; and greatest care must be taken to assure admission is not coerced or suggested or product of ignorance of rights or of adolescence fantasy, fright or despair).

The facts of this case demonstrate, with complete clarity, the manner in which a *per se* "concerned adult" counselling requirement would upset the carefully drawn balance of the *Miranda* doctrine. Respondent was found by the trial court to be "a little more sophisticated than the average fifteen-year-old." Although she knowingly and voluntarily waived her *Miranda* rights, the majority nonetheless found her statements to be involuntary because her mother sought to and was not afforded an opportunity to confer with her. The presence of respondent's mother, however, does not serve to further respondent's comprehension of and ability to assert her privilege against self-incrimination. Respondent did not even ask for her mother and she had no difficulty comprehending or exercising her Fifth Amendment rights should she have chosen to do so. Respondent's theatrics for the news cameras completely dispel any notion that respondent was coerced or felt compelled in any way to incriminate herself involuntarily.

The *Miranda* doctrine was developed to dissipate the inherent compulsion of the in-custody interrogation setting. This Court was careful to confine the *per se* requirements of this doctrine to those that clearly and actually serve to protect the suspect's right against self-incrimination. The majority's additional *per se* requirement has now given a third party an absolute right to upset a juvenile's knowing and intelligent waiver of that right. This result is particularly offensive when the consultation with, or presence of, a "concerned adult" does nothing more to further the Fifth Amendment interests of the juvenile than what is already protected under the *Miranda* doctrine.

The majority's holding upsets the carefully crafted balance this Court has stricken in the context of Fifth Amendment jurisprudence. While the issue of the exact parameters, and requisites of, in-custody interrogation of juveniles is an issue that should be addressed by this Court, this Court should nonetheless conclude that there is no constitutional requirement that a juvenile suspect be allowed to confer with a "concerned adult" prior to making a confession. This extension of the *per se* aspects of the *Miranda* doctrine would needlessly upset the balance drawn by this Court without serving the purpose that the procedural aspects of *Miranda* were designed to protect.

B. The Myriad Approaches By The States To The Issue Of Whether Preconfession Counselling With A "Concerned Adult" Or Parent Is Required Under The Fifth Amendment Compels This Court To Address This Issue And Create Constitutional Uniformity.

The prophylactic measures set forth in *Miranda*, in effect, create a bright-line standard that secures an accused's Fifth Amendment right against self-incrimination, as well as provides officers and prosecutors with specific guidelines to follow when interrogating suspects. However, in the context of juveniles, the bright-line effect of the *Miranda* warnings has significantly paled due to this Court's failure to identify the status, if any, a parent has in the *Miranda* equation. In the absence of a directive from this Court, the several States have struggled to determine whether a juvenile has a right to consult with a parent prior to interrogation; whether an interrogation must cease upon a juvenile's request to speak to a parent; whether a juvenile has a right to have a parent present during the interrogation; and whether a parent's

request to see a juvenile invalidates an otherwise voluntary waiver of his right to remain silent and consult with an attorney. Unfortunately, the answers to these questions differ from State to State. However, more disturbing is the fact that many of the diverse approaches are based, in whole or in part, on fundamentally inconsistent interpretations of the Fifth Amendment of the United States Constitution. The present case provides this Court with the unique opportunity to finally eradicate the divergent interpretations of the Fifth Amendment.

Significantly, the need for guidance has not gone unnoticed by one former member of this Court. In *Little v. Arkansas*, 435 U.S. 957, 98 S.Ct. 1590, 1591, 55 L.Ed.2d 809 (1978), Justice Marshall vehemently dissented from the denial of writ for certiorari seeking the review of the question "whether, before a juvenile waives her constitutional rights to remain silent and consult with an attorney, she is entitled to competent advice from an adult who does not have significant conflicts of interest." Similarly, in *Riley v. Frazen*, 435 U.S. 1000, 1002, 98 S.Ct. 1657, 1658, 56 L.Ed.2d 91 (1978), Justice Marshall dissented from the denial of a writ of certiorari which requested this Court to answer the question "whether an accused child's request to see a parent must be honored by the police before they continue interrogation, at least when the parent is available at the police station and interested in speaking to his child." Justice Marshall pointed out that "there is a conflict of authority on this question that indicates a need for this Court to exercise its certiorari jurisdiction." 435 U.S. at 1002, 98 S.Ct. at 1658. Justice Marshall demonstrated great prescience because, almost 18 years after his dissents, a conflict among the States continues to exist.

Often, in an effort to anticipate what this Court would hold should it ever decide the issue, many States have attempted to statutorily define the parent's role with respect to custodial interrogations of juvenile offenders. Many States, like Illinois, have simply enacted prompt parental notification provisions.[6] Other states have enacted provisions which subject law enforcement officials to more stringent requirements.[7]

Although States are free to statutorily provide juveniles with greater protection, some States have either enacted questionable legislation aimed at codifying the present dictates of *Miranda* or have intertwined their statutory analysis with an erroneous interpretation and application of the Fifth Amendment. Either approach runs afoul of the Fifth Amendment and this Court's *Miranda* doctrine. For example, the Colorado legislature enacted section 19-2-210(1) which provides, in relevant part, that:

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[6] See Alaska Stat. Sec. 47.10.140(a) (1995); Del. Code Ann. tit. 10, Sec. 933 (1995); Mo. Rev. Stat. Sec. 211.131.2 (1969); N.Y. Crim. Proc. Law Sec. 140.20(6) (1995); Md. Cts. & Jud. Proc. Code Ann. Sec. 3-814(b) (1984).

[7] Wash. Rev. Code Sec. 13.40.140(9),(10) (1995) (Only a parent or guardian can waive rights of a child under 12; for child over the age of 12 the presence of a parent, guardian or custodian is not necessary to render a waiver valid); Miss. Code Ann. Sec. 43-21-303(3) (1995) (A person taking a child into custody shall also make continuing reasonable efforts to notify the child's parent, guardian or custodian and invite the parent, guardian or custodian to be present during the interrogation); N.C. Gen. Stat. Sec. 7A-595(a) (1995) (In addition to *Miranda* warnings, law enforcement officials must advise a juvenile in custody that he has a right to have a parent present during questioning).

> "No statements or admissions of a child made as a result of interrogation of the child by a law enforcement official . . . shall be admissible in evidence against that child unless a parent, guardian, or legal custodian were advised of the child's [*Miranda* rights] except that, if a public defender or counsel representing the child is present at such interrogation, such statements or admissions may be admissible in evidence even though the child's parent, guardian, or legal custodian was not present." Colo. Rev. Stat. Sec. 19-2-210(1) (1973).[8]

In interpreting this provision, the Supreme Court of Colorado held that by requiring the presence of a parent, legal guardian or attorney during the advisement of the rights under *Miranda* and during any interrogation, the statute provides "an additional and necessary assurance that the juvenile's Fifth Amendment right against self-incrimination . . . will be fully afforded to him." *People v. Saiz*, 620 P.2d 15 (Colo. 1980); quoting, *People v. Maes*, 194 Colo. 235, 237, 571 P.2d 305, 306 (1977). Since this Court has not adopted a *per se* requirement that a parent, guardian or legal custodian must be present during the advisement of *Miranda* warnings or interrogation, Colorado has erroneously added the right to preconfession parental counselling to the equation of *Miranda*. As this Court has stated, "[A] State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1290, 43 L.Ed.2d 570 (1975).

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[8] Although this provision has been subsequently amended, the changes do not impact the present analysis. *See*, Colo. Rev. Stat. Sec. 19-2-210(1) (Supp. 1992).

In *People v. Bryant*, 6 Cal. 3d 375, 491 P.2d 793, 796 (1971), the Supreme Court of California was asked to decide whether a minor's request to see his parents invoked his Fifth Amendment right to remain silent. Based on a fundamentally inaccurate interpretation of the Fifth Amendment, the *Bryant* court, with one justice dissenting, held that when a "minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, in the absence of evidence demanding the contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege." 491 P.2d at 798. In so holding, the *Bryant* court reasoned:

> "It appears to us most likely and most normal that a minor who wants help on how to conduct himself with the police and wishes to indicate that he does not want to proceed without such help would express such desire by requesting to see his parents. For adults, removed from the protective ambit of parental guidance, the desire for help naturally manifests in a request for an attorney. For minors, it would seem that the desire for help naturally manifests in a request for parents." *Bryant*, 491 P.2d at 792-793.

In essence, the *Bryant* court appears to hold that a juvenile's request to see his parent prior to, or during, interrogation creates a "rebuttable presumption" that he has invoked his Fifth Amendment right to remain silent. However, other courts have gone even further.[9] For example, several Florida courts consider a juvenile's re-

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[9] See also, *Commonwealth v. Christmas*, 502 Pa. 218, 465 A.2d 989, 992 (1983) (where a similar rebuttable presumption was adopted only to be abandoned a year later).

quest to call a parent to be an assertion of his Fifth Amendment privilege against self-incrimination. *Sublette v. State*, 365 So.2d 775 (Fla. Dist. Ct. App. 1978), appeal dismissed, 378 So.2d 349 (Fla. 1979); *Dowst v. State*, 336 So.2d 375 (Fla. Dist. Ct. App. 1976), *cert. denied*, 339 So. 2d 1172 (Fla. 1976). Thus, in Florida when a juvenile in custody requests to talk to his parents, the police must cease the interrogation.

Additionally, a minority of States have adopted a *per se* rule, commonly known as the "interested adult rule" pursuant to which an adult interested in the juvenile's welfare, generally a parent, must be informed of the child's rights, have an opportunity to consult privately with the child, and be present during any interrogation. *Lewis v. State*, 259 Ind. 431, 288 N.E.2d 138, 142 (1972); *State in Interest of Dino*, 359 So.2d 586, 594 (La. 1978); *Commonwealth v. A Juvenile (No. 1)*, 389 Mass. 128, 449 N.E.2d 654, 657 (1983) (applies absolutely for juveniles under 14; for those 14 or over the prosecution has a very heavy burden if no consultation permitted).[10] The holding of the majority in the instant cause most closely allies itself with this approach.

However, Pennsylvania's experience with the application of the *per se* "interested adult" standard is illustrative of the rule's inflexibility and failure to strike a sound balance between the goal of dissipating the coercion in-

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[10] In adopting the *per se* "interested adult" standard, courts rely on studies indicating a significant percentage of juveniles do not understand their constitutional rights and a belief that a *per se* rule would assist the police by providing a definite standard. *See*, *State in Interest of Dino*, 359 So.2d 586, (La. 1978); *Commonwealth v. McCutchen*, 463 Pa. 90, 343 A.2d 669 (1975).

herent in custodial interrogations and the competing need for police questioning as a tool for effective enforcement of criminal laws. Pennsylvania applied the *per se* "interested adult" rule described above, also known as the *McCutchen* rule, when the suspect was under the age of eighteen. *McCutchen*, 463 Pa. 89, 343 A.2d 669 (1975). Interestingly, the *McCutchen* rule replaced the totality of circumstances test in the context of evaluating a juvenile's relinquishment of his right to remain silent and consult with an attorney.

About eight years later, Pennsylvania's Supreme Court re-examined the rule and, in doing so, acknowledged that its adherence to such an unbending rule resulted in "the exclusion from evidence of juvenile confessions that were in fact knowingly and voluntarily given." *Commonwealth v. Christmas*, 502 Pa. 218, 465 A.2d 989, 992 (1983). The *Christmas* court, in overruling *McCutchen*, recognized the lack of wisdom in a *per se* rule:

> ". . . we believe that the protection of juveniles against the innate disadvantages associated with the immaturity of most youth may well be achieved in a manner that affords more adequate weight to the interests of society, and of justice, while avoiding *per se* applications of the interested and informed adult rule that serve, in an overly paternalistic fashion, to provide means for juvenile offenders to secure suppression of confessions in fact given in a knowing, intelligent and voluntary manner." *Christmas*, 465 A.2d at 992.

Thus, in its stead, the *Christmas* court created a "rebuttable presumption" that a juvenile is incompetent to waive his constitutional rights to remain silent and consult with an attorney without first having the opportunity to consult with an interested and informed adult. *Id.*

Significantly, a year later, the Pennsylvania Supreme Court also abandoned the application of the "rebuttable presumption" because, it "served no useful analytical purpose." *Commonwealth v. Williams*, 504 Pa. 511, 475 A.2d 1283, 1287-88 (1984) (Nix, C.J. and Zappala, J. dissenting). Specifically, the *Williams* court determined that the "so-called presumption is not a presumption at all since it merely verifies the Commonwealth's established burden of proving a knowing, intelligent and voluntary waiver on the part of a juvenile." *Williams*, 475 A.2d at 1287-88. Thus, the Supreme Court of Pennsylvania came full circle and re-adopted the totality analysis. The *per se* rule applied by the instant majority, as demonstrated by the Pennsylvania experience, is unworkable and does not serve any useful constitutional purpose.

In addition to the reasons espoused by Pennsylvania, other factors weigh against the adoption of a *per se* "interested adult" rule. Significantly, the rule does not comply with this Court's decision in *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). This Court has determined that "the *per se* aspect of *Miranda* was . . . based on the unique role the lawyer plays in the adversarial system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." *Michael C.*, 442 U.S. at 719, 99 S.Ct. at 2569. In comparison, a parent or other interested adult does not share a lawyer's unique position. To the contrary, a parent or other interested adult, like the probation officer in *Michael C.*, could be compelled by the prosecution to testify concerning a juvenile's inculpatory statements. Once under the power of a subpoena, a parent is like any other witness

who is obligated to testify truthfully. There is no parent-child privilege protecting a juvenile from this dilemma. Moreover, the determination that a parent is "competent" or sufficiently "informed" arguably requires a subjective analysis that is susceptible to inconsistent results. Unlike a lawyer whose sole duty is to provide sound legal advise, a parent, usually ignorant of the law, will naturally tend to provide emotional, psychological and/or moral support which could serve to undermine a juvenile's right to remain silent. E.g., *Matter of C. P.*, 411 A.2d 643 (D.C. 1980) (Ferrn, J. dissenting) (where mother privately urged her minor son to "tell the truth," despite the fact that he had previously, in the presence of his mother, told the police that he desired to remain silent and consult with an attorney); and *Little v. Arkansas*, 435 U.S. 957, 98 S.Ct. 1590, 1591, 55 L.Ed.2d 809 (1978), Marshall, J., dissenting opinion in denial of writ for certiorari (petition provides a scenario that gives rise to a conflict of interest between a juvenile and her mother; the juvenile was suspected of killing her father, and prior to making a confession spent time with her mother who was also a suspect and previously questioned by the police).

Fortunately, a majority of the courts apply the totality of the circumstances standard in assessing the impact that the presence or absence of a parent has on the issue of whether a juvenile voluntarily waived his right to remain silent and consult with an attorney.[11] As the deci-

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[11] These jurisdictions typify the application of the totality analysis: Maryland—*State v. McIntyre*, 309 Md. 607, 526 A.2d 30 (1987) (with three justices dissenting, highest court rejected the interested adult rule and adopted the totality of circumstances standard); Wyoming—*Jahnke v. State*, 692 P.2d 911

(continued...)

sions of Pennsylvania's Supreme Court demonstrate, the totality of the circumstances test, set forth and applied in the *Miranda* doctrine as it currently exists, is best suited for evaluating and protecting the validity of a juvenile's waiver of his right to remain silent and consult with an attorney. By its very definition, the age, maturity, intelligence and background of the juvenile are factored into the analysis. Such an analysis dispels the concern that due to his lack of sophistication and maturity, a juvenile is susceptible to compulsion. *See*, *In re Williams*, 265 S.C. 295, 217 S.E.2d 719, 722 (1975) (where the North Carolina Supreme Court determined that "[t]he question of whether a minor can knowingly waive his constitutional rights is analogous to the question of whether the confession of a mentally subnormal person is admissible."); and *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 3050, 61 L.Ed.2d 797 (1979) (where this Court determined that every minor seeking an abortion must have the right under state regulation to go to court and prove that she is mature and well enough informed to make intelligently the abortion decision on her own without parental consultation). These are the very concerns which motivated the instant majority, and many other States, to apply the *per se* constitutional rule in the instant cause. These concerns, however, as demonstrated above, are better protected by the current, flexible totality of the circumstances aspect of the *Miranda* doctrine.

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[11] (...continued)
(Wyo. 1984) (Cardine, J. filed dissenting opinion; Rose, J. joins in dissent) (under the totality analysis the fact juvenile was not given an opportunity to consult with parent does not render a waiver ineffective as a matter of law); See also, Utah—*State v. Hunt*, 607 P.2d 297 (Utah 1980).

In joining the majority of the jurisdictions by adopting the totality of the circumstances test, the West Virginia Supreme Court reasoned:

> ". . . that circuit courts are equipped with the expertise and experience to make competent evaluations of the special circumstances involved in a juvenile's waiver of rights and should be allowed the discretion to do so. Requiring the presence of parents in every case in which a juvenile is in custody and informed of his rights 'would be overly protective; would exclude from evidence juvenile statements that are in fact, knowingly and voluntary given; and would restrict law enforcement unnecessarily' . . . This Court should not and will not ignore the fact that juvenile crime is as serious a menace to society as those committed by adults. To the victims of crime, the age of the perpetrator is inconsequential." *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469, 478-470 (1995).

However, despite its compliance with *Miranda* and *Michael C.*, the totality analysis has also been subject to diverse applications by several state courts. For example, some courts regard a parental notification violation to be just one factor in the ambit of the totality of circumstances analysis under the Fifth Amendment. *In Interest of A.D.R.*, 603 S.W.2d 575 (Mo. 1980) (Seiler, J, dissents and Brardgett, C.J. joins dissenting opinion). Other courts intentionally separate the issue of compliance with a notification provision from any questions concerning *Miranda* waivers. *Haug v. State*, 406 A.2d 38 (Del. 1979); *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (W.Va. 1995). For yet another approach, see the case of *In re Williams*, 217 S.E.2d 719 (S.C. 1975), where the court analyzed the violation of a prompt notification on both the theories of an "illegal arrest" *and* a Fifth Amendment violation.

Similar divergent approaches have surfaced in cases dealing with statutes that give juveniles the right to consult with a parent. In Alabama, Rule 11(a) gives a juvenile the right to communicate with his attorney, parent or guardian, as well as imposes an affirmative duty on officials to provide, if necessary, the "reasonable means" to do so. Ala. Rule. Juv. Proc. Rule 11(a). Although, in Alabama, a juvenile has a statutory right to communicate with a parent or guardian, a violation of that provision does not automatically render a confession inadmissible. Instead, courts must apply the totality of the circumstances standard as espoused by this Court's Fifth Amendment cases. *Smith v. State*, 611 So. 2d 1023 (Ala. 1992). Some courts apply the totality analysis, but do not include access to parents as a factor. E.g., *People v. Gullings*, 244 Or. 173, 416 P.2d 311 (1966); and *In re Williams*, 265 S.C. 295, 217 S.E.2d 719 (1975). Reflective of yet another approach to the totality test, in New Hampshire, the State must prove "beyond a reasonable doubt" that defendant was warned of his constitutional rights before his statements are deemed admissible. *State v. Benoit*, 126 N.H. 6, 490 A.2d 295, 301 (1985).

In sum, this Court should be concerned with the alarming number of fundamentally inconsistent approaches that are applied to identify the status a parent has in the equation of *Miranda*. Since these distinct approaches are based, in whole or in part, on inconsistent interpretations of the Fifth Amendment, they should not be allowed to co-exist. Whether preconfession counselling with a concerned adult is mandated under the Fifth Amendment to the United States Constitution should not depend upon which State the minor suspect happens to be subjected to in-custody interrogation. This Court

should be the sole arbiter of the requirements of the Fifth Amendment in juvenile in-custody interrogation situations. There is no question that this area of the law is helplessly muddled, which explains why the majority of the appellate court felt free to ignore the Fifth Amendment totality standard and reverse this case simply on "principle." *Montanez*, 273 Ill. App. 3d at 855.

II.

THE *PER SE* REQUIREMENT OF PRECONFESSION COUNSELLING WITH A "CONCERNED ADULT" OR PARENT APPLIED BY THE MAJORITY IS BASED UPON ITS PERCEPTION OF THIS COURT'S FIFTH AMENDMENT JURISPRUDENCE IN THE CONTEXT OF JUVENILE IN-CUSTODY INTERROGATION.

A majority of the appellate court in the instant cause reversed respondent's conviction because it found her confession to be involuntary. A careful reading of the opinion, as the dissenting Justice makes clear, leads to the inescapable conclusion that the majority took issue with the police conduct in this case. The majority found that the police conduct in not permitting respondent's mother to confer with respondent prior to her confession rendered the resulting confession involuntary. This conclusion can only be based upon the majority's perception of the post-*Miranda* federal constitutional requirements in the context of in-custody interrogation of juveniles.

The State of Illinois has provided law enforcement personnel with a limited amount of statutory guidance when confronted with this situation. The following provision provides, in pertinent part:

> "A law enforcement officer who takes a minor into custody without a warrant . . . shall, if the minor is

> not released, immediately make a reasonable attempt to notify the parent or other person legally responsible for the minor's care or the person with whom the minor resides that the minor has been taken into custody and where the minor is being held . . . ." 705 ILCS 405/5-6.

As the dissent points out, the majority's holding clearly cannot rest upon this statutory provision. This provision only speaks to notification—not parental presence. 273 Ill. App. 3d at 858. Moreover, even assuming it applies in the case where a minor is deemed to be an adult for purposes of criminal prosecution,[12] the Illinois Supreme Court has expressly stated that failure to comply with this provision "will not, of itself, invalidate a confession or statement of an accused." *People v. Zepeda*, 47 Ill. 2d 23, 265 N.E.2d 647 (1970). As the dissent correctly notes, "It is thus not surprising that the well-established standard in Illinois is that any violation of the statute is merely a consideration in weighing the totality of circumstances." 273 Ill. app. 3d at 859.

A review of Illinois caselaw makes clear that there is no requirement in Illinois, constitutional or statutory, that a parent be allowed to confer with a minor child prior to that child's confession. See 273 Ill. App. 3d at 856-859. It is not surprising, then, that the majority makes no citation to any state constitutional or statutory provision in support of its holding. Rather, the majority applied what it perceived would be this Court's position should it address this issue. In reliance upon this Court's earlier indications that juvenile confession cases *may* re-

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[12] It is the People's position that the entire Juvenile Court Act, including this provision, does not apply in this context.

quire special analysis, in *In re Gault*, 387 U.S. 1, 55, 18 L.Ed.2d 527, 561, 87 S.Ct. 1428, 1458 (1967) and *Haley v. Ohio*, 332 U.S. 596, 599, 92 L.Ed. 224, 228, 68 S.Ct. 302, 303-304 (1948), the majority fashioned its own constitutional rule. 273 Ill. App. 3d at 853. Drawing upon the "special scrutiny" language of these two cases, the majority concluded that, because respondent was interrogated and confessed without having an opportunity to confer with her mother, her confession was *per se* involuntary.

Applying this Court's jurisdictional requirements to this cause, the majority opinion "fairly appears to rest primarily on federal law, or to be interwoven with the federal law" and it does not contain a " 'plain statement' that [it] rests upon adequate and independent state grounds." *Illinois v. Rodriguez*, 497 U.S. 177, 182, 110 S.Ct. 2793, 2798, 111 L.Ed.2d 148 (1990), citing *Michigan v. Long*, 463 U.S. 1032, 1040, 1042, 103 S.Ct. 3469, 3476, 3477, 77 L.Ed.2d 1201 (1983). Clearly, the majority opinion relies upon federal constitutional law and it does not contain the requisite indication that it rests upon adequate and independent state grounds. Thus, as this Court has before stated, we must "accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Illinois v. Rodriguez*, 497 U.S. at 182, 110 S.Ct. at 2798.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully prays that this Honorable Court grant the instant petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

No. 1-93-4519

In The Appellate Court of Illinois
First District—Second Division
Opinion Filed June 30, 1995

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
vs.	)	Honorable John J. Mannion,
JACQUELINE MONTANEZ, Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARTMAN delivered the opinion of the court:

A jury found defendant, Jacqueline Montanez, age 15 at the time of the offenses, guilty of the murders of Hector Reyes and Jimmy Cruz. She was sentenced to natural life in prison. She challenges the voluntariness of her confession and the *voir dire* of prospective jurors.

Defendant moved to suppress her statements as involuntary because (1) she was not first informed of her *Miranda* rights or (2) that she would be tried as an adult; (3) her mental state and ingestion of drugs and alcohol made her incapable of understanding her rights; (4) the statements were procured by material misrepresentation; and (5) the statements were taken before she had access to a youth officer or her parents.

At the suppression hearing, Chicago police detective Ernest Halvorsen testified that on May 13, 1992, at 9 p.m., he and his partner, detective Renaldo Guevara, arrested defendant on the street for the May 12 murders of Hector Reyes and Jimmy Cruz. He knew defendant

was a juvenile. She was taken to the Area Five police headquarters and placed in an interview room, where Halvorsen informed her of her *Miranda* rights and that she could "possibly" be charged as an adult. Defendant indicated that she understood these rights.

Detective Halvorsen asked that a police squad car from the 14th District be sent to defendant's home in an attempt to locate her family. Detective Guevara later told him that defendant's mother had been contacted, but said she would get to the police station as soon as she could. Halvorsen was unaware that defendant's mother was at Area Five or had not been allowed to see defendant.

After the arrest, Detective Halvorsen attempted to contact a youth officer. The youth officer on duty in an adjoining station at that time was busy. Halvorsen did not check again to see whether the youth officer later became available. An Area Five youth sergeant informed him that no Area Five youth officer was then available either, but that he would send the first available officer, who was to come on duty at midnight.

Nevertheless, at about 10 p.m., Detective Halvorsen began to question defendant. No youth officer had yet appeared. He again read her the *Miranda* warnings. She responded that she understood each of her rights and would make a statement. He had a 20 to 30 minute conversation with her and then left her alone in the interview room.

Youth officer Robert Pulia and Assistant State's Attorney (ASA) John Dillon arrived a little past midnight. Detective Halvorsen told Pulia the facts of the case. Later, at about 12:30 a.m., Pulia had a private conversation

with defendant. He knew Detective Halvorsen already had taken a statement from her. He advised her of her *Miranda* rights anyway, informed her that he was a youth officer, he was present to protect her rights, and he would observe how she was being treated. Pulia told her that her mother had been contacted, based upon what he was told. Pulia was present for the next three conversations Detective Halvorsen and ASA Dillon had with defendant, at 1:15 a.m., 5:15 a.m., and 6:15 a.m.

At 1:15 a.m., ASA Dillon told defendant who he was. She said she understood. Dillon advised defendant of her *Miranda* rights and that she would be treated as an adult, which defendant again stated that she understood. She then spoke to Dillon for about 20 to 30 minutes and agreed to make a statement in the presence of a court reporter. She was given food. Alone with Dillon, defendant told him that she had been treated well and had no complaints.

At 5:15 a.m., a court reporter took defendant's statement, upon ASA Dillon's questions, which was transcribed at 6:15 a.m., and reviewed by Dillon and defendant. Dillon had defendant read a couple of sentences out loud, to make sure she could read and understand English; then he read the rest of the statement to her. Defendant made corrections where appropriate and signed the statement. Dillon saw no one in a waiting area in Area Five headquarters. He did not know that anyone was asking to speak with defendant.

According to Detective Halvorsen, Officer Pulia, and ASA Dillon, defendant did not appear to be under the influence of alcohol or other drugs during their conversations with her. They smelled no alcohol or other drugs. Defendant was sober and coherent, and understood and

answered all questions asked of her. Defendant did not state that she was high or under the influence of alcohol.

Defendant's mother, Sandra Lorenzi, testified at the suppression hearing. On May 13, 1992, at 10 p.m., she and her husband were at home. Two police detectives came there and first told her that defendant had witnessed a murder and was in protective custody. She asked to see her daughter. The detectives told her that she could not at that time because they had her in custody. One officer told her that he would let her know when she could see her daughter. Before they left, however, the officers informed her that defendant was involved in a murder.

Lorenzi waited for the police to call. They did not. At about 2 a.m., she nevertheless went to the police station, where she was told to wait in a waiting room. Instead, she went upstairs but a detective sent her back downstairs. She waited about an hour and one-half and then went back upstairs. The detective told her to "get the hell out" of there because the police were talking with her daughter. She went back upstairs every hour or so. She was not permitted to see defendant until about 8:30 a.m., when she and a friend were allowed into a room to see her. Defendant appeared to be "gagging," and her eyes were bulging. She had seen defendant on alcohol and other drugs before, and defendant appeared the same way. It was difficult to understand defendant. She did not appear to recognize her mother. Lorenzi believed defendant was on drugs or alcohol that morning. After about five minutes, Lorenzi was told by police to leave.

Following argument, the court denied defendant's motion to suppress, finding that the police "exercised a good faith effort after the defendant was arrested when

they notified the mother of her incarceration" and that the "only real issue is whether or not the mother was allowed access to the daughter at the police station."

A grand jury indicted defendant on June 19, 1992 for first degree murder and related charges.

At trial, evidence was adduced showing that on May 12, 1992, shortly after midnight, a witness heard laughing and giggling coming from an area in Humboldt Park near a park lavatory. Three women were seen there, one of whom was taller than the other two, and two men. The taller woman, later identified as defendant, was seen entering the ladies washroom with one of the men. A noise that sounded like a firecracker was heard, and the taller woman emerged from the washroom alone. The two shorter women were seen walking with the second man. One went behind the man. A flash was seen behind the second man, and he fell to the ground. The two shorter women ran, the taller one kicked the body and ran in the direction of the other two.

Chicago police detective John Dolan, at Humboldt Park during the early morning hours of May 12, 1992, observed the bodies of Jimmy Cruz on the sidewalk and Hector Reyes in the washroom. Next to the body of Cruz he found a .25-caliber automatic shell casing. He also recovered a bullet near Reyes.

On May 11, 1992, at 11 p.m., defendant and two other girls, "Mauri," and "Tuti," all members of the Disciples street gang, were seen in a white car by Yvette Rodriguez. She declined to go with them to do a "hit." At 1 a.m., Rodriguez saw the same three young women again, who told her that they had shot the guys. Defendant said that she shot one in the head and back, pointing to the back of her head.

Later that day, Rodriguez was arrested for possession of a controlled substance; she had been arrested earlier on a drug charge, which was still pending. While at the police station, Rodriguez claimed that she knew about the double murder. She drove around with the police looking for defendant, Mauri and Tuti. The next day she went with the police to a funeral home in an undercover van. She pointed out defendant and Mauri at the funeral, both of whom were arrested.

Detective Halvorsen testified that on May 13, 1992, at about 8 p.m., he was in an unmarked car at a funeral home in the area of Armitage and Kimball. He had the names of Loca D, whom he identified as defendant, and Mauri and Tuti. All three were members of the Maniac Latin Disciples (MLD). The funeral was for a member of the MLD who had been killed a few days earlier. The witness pointed out defendant and Mauri, and both were arrested. Halvorsen testified concerning the taking of the statements from defendant, consistent with his testimony at the hearing on the motion to suppress. Halvorsen identified defendant in court as the person who made the statements. ASA Dillon also testified as he did at the hearing, reading to the jury defendant's signed statement as transcribed by the court reporter. In the statement defendant confessed to shooting Reyes in the lavatory and to giving the gun to Mauri, who then shot Cruz on the sidewalk.

Following the introduction of related evidence, the State rested. The court denied defendant's motion for a directed verdict.

Defendant's mother testified on her behalf as she did at the suppression hearing.

Defendant testified for the defense. Her nickname in the MLD was Loca D, which meant Crazy Disciple. She used marijuana, T-sticks, cocaine, and acid, and was hospitalized for an overdose in 1987. She also drank alcohol. Defendant was with Marilyn Mulero (Mauri) getting high on May 11, 1992, at 5 or 6 p.m., when they met Rodriguez. They joined her in her car and drove around, stopping to buy drugs, and got high at about 7 p.m. Tuti joined them. Defendant took five tabs of acid and began to hallucinate. The next thing she remembered was seeing a gun at Humboldt Park. While they were driving around, they had seen Cruz and Reyes in a car. There was no plan. Cruz asked if they wanted to get high with him, and they followed him to Humboldt Park. Defendant denied going into the washroom with Reyes, contending instead that Rodriguez did so. She opened the door and saw Rodriguez shoot Reyes. Rodriguez pointed the gun at her and told her she had not seen or heard anything. Rodriguez then shot Cruz in the back of the head.

When defendant went to a funeral the next day, she was arrested. She had been drinking alcohol and smoking marijuana. She had also used cocaine and T-sticks, and drunk hard liquor. She remembered being shown her statement, transcribed by the court reporter at the police station, but did not remember signing it. The police made her confess, and her statement was not the truth. She misspelled her own name 11 times because she was high. The police did not beat her up or strike her. She received food, soda, and cigarettes. She confessed because she was scared and tricked by the police. The defense rested.

The jury found defendant guilty of the murders of Cruz and Reyes. She was sentenced to the mandated term of natural life in the custody of the Illinois Department of Corrections. She appeals.

Defendant first asserts that the circuit court erred in denying her motion to suppress her confession where the evidence shows that she was denied access to a concerned adult. She argues that failing to have either a youth officer or a parent present is material to determining the voluntariness of her statement since she was a minor.

The facts in this case make it abundantly clear that defendant had undergone police questioning and confessed prior to seeing either a youth officer or her mother. Later, other police interviews were undertaken even while the mother was at the police station asking to see her 15-year-old daughter, but was kept from her. It is not a sufficient answer to say that since defendant later was tried as an adult, meaningful notice need not have been given and consequential protections need not have been afforded her.

The investigating officer, Detective Halvorsen, testified defendant arrived at Area Five at 9:30 p.m. He asked others to notify her mother between 9:30 and 10:00 p.m. One youth officer on duty was busy; he made no effort to recontact her. The Area Five youth sergeant told him no one else was then accessible and that the first person available after midnight would be assigned. Nevertheless, Halvorsen began interrogating defendant minutes later, at 10:00 p.m.

Detective Halvorsen requested the 14th District to send a squad car to defendant's home, which was in that

district. He did not pursue his request and did not personally know if it had been followed. At midnight, Halvorsen's partner, Detective Renaldo Guevara, told him that defendant's mother had been "contacted." The police subjected defendant to the same routine questioning as they would have a criminal suspect without special regard for age or parental preconfession counselling. The youth division was contacted, yet no youth officer conferred with her prior to police interrogation. She had already given one statement to Halvorsen before the youth officer saw her for the first time at 12:30 a.m. Courts must be particularly careful in cases involving juveniles because "the coerciveness of a situation is thereby enhanced." *People v. Cole* (1988), 168 Ill. App. 3d 172, 179, 522 N.E.2d 635, *appeal denied* (1988), 122 Ill. 2d 582; *cert. denied sub nom. Holman v. Illinois* (1989), 489 U.S. 1021, 103 L.Ed.2d 203, 109 S.Ct. 1143.

The facts in this case demonstrate the danger of cursory application of principles to facts. What "reasonable notice" was given here? Sandra Lorenzi, defendant's mother, testified that the police came to her home at about 10 p.m. They first told Ms. Lorenzi her daughter had witnessed a murder. Later in this conversation, they told her the daughter was involved in a murder. Without contradiction, Ms. Lorenzi testified to the following: she immediately told the police she wanted to go to the station. The police told Ms. Lorenzi not to come and that they would call her when it was time for her to come. The call from police never came. At 2 a.m., when Ms. Lorenzi became desperate, she went to the station on her own. The fact that the police told Ms. Lorenzi not to come and did not threaten her if she did come does not change that fact that the police psychologically and effectively prevented Ms. Lorenzi's visit to her daughter until

after all the questioning was completed and the confession was taken.

It takes little mental effort to understand the reluctance of a parent to disregard a police directive, to stay at home until police called her. To say that this evidence clearly establishes that the police made a "good faith" effort after defendant was arrested when they notified defendant's mother of her arrest makes a mockery of the concept of "reasonable notice." "Notice" here must be understood to have some purpose, namely, to allow, where possible, the concerned adult to confer and counsel with the juvenile *before* interrogation and confession. Yes, an attempt was made to contact a youth officer before the statement was taken; but the interrogation went forward anyway, within minutes. And yes, the parent here was "notified," but in the same breath she was told she could not see her child until called. These circumstances demonstrate the intended fulfillment of notice here was simply a tragic charade. See generally *People v. McGhee* (1987), 154 Ill. App. 3d 232, 507 N.E.2d 33.

As previously mentioned, Ms. Lorenzi testified that by 2 a.m. she was desperate, and although the police had not contacted her as promised, she nevertheless went to the police station, spoke to the desk sergeant, and was again told to wait. Instead, she went to an upstairs area of the station and spoke to a Spanish-speaking detective who had come to her house. He also told her to wait downstairs. She waited in the station for another hour and one-half. Nobody contacted her. She went upstairs again. The same Spanish-speaking detective told her to "get the hell out" of there because they were talking to defendant. Several times more she unsuccessfully tried to see her daughter. Eventually, at 8:30 a.m., long past any opportunity for counselling, she was allowed a visit.

According to the record, defendant's court reporter statement was taken at 5:15 a.m. She signed it at 6:15 a.m. Ms. Lorenzi was at the station trying unsuccessfully to see her daughter while investigative questioning was proceeding and the statement was taken. The State chose not to call the desk sergeant to testify in contradiction, nor the Spanish-speaking detective to whom she had spoken. No one who was even potentially in a position to contradict Ms. Lorenzi testified for the State in this aspect of the case.

Detective Halvorsen, who was constantly with defendant; youth officer Pulia, who was with defendant most of the time from 12:30 a.m. on; and ASA Dillon, who was with defendant from about 1:15 a.m. on, did testify. They, however, were in no position to contradict Ms. Lorenzi because they claimed they were not "aware" she was present at Area 5 headquarters. The circuit judge correctly found that defendant's mother arrived sometime after the arrest; the judge erroneously found, however, that the officers testified that at no time did she ask to see her daughter. In fact, no officer testified that Ms. Lorenzi did not ask to see her daughter; rather, they claimed that they were not "aware" of her request. On almost identical facts, Justice Charles Freeman, now an Illinois Supreme Court justice, but then writing for a unanimous appellate court, explained in *People v. Brown* (1989), 182 Ill. App. 3d 1046, 1053-54, 538 N.E.2d 909:

> "Brown's mother testified that she arrived at Area 6 late in the evening, around 7 o'clock on December 23. It is a reasonable inference from the testimony of the State's witnesses that they were not aware of her presence at Area 6 until they ended their interrogation of Brown at about 8:30 p.m. However, the fact that the assistant State's Attorney and police officers

> who were questioning Brown did not know of his mother's presence at Area 6 is insufficient to avoid the obligation to allow a parent to see his or her child where, as here, the parent has indicated an interest by her presence at the police station. Under such circumstances, *the officers who know of the parent's presence have an affirmative duty to inform those actually questioning a juvenile of the parent's presence and request to see her child. And, in order to ensure the true voluntariness of a statement, those actually questioning the juvenile have an affirmative duty to stop the questioning and allow the parent to confer with her child.*" (Emphasis added.)

Clearly, the alleged "notice" given here was vacuous. Defendant's statements were made before she had an opportunity to confer, prior to questioning, with an adult demonstratively interested in her welfare, her mother, who was present at the station for over six hours. Such failure is "material to determining the voluntariness of [a minor] defendant's statement." *People v. Knox* (1989), 186 Ill. App. 3d 808, 815, 542 N.E.2d 910 (*Knox*); *People v. R.B.* (1992), 232 Ill. App. 3d 583, 594, 597 N.E.2d 879.

In *Knox*, defendant's convictions were reversed because the confession should have been suppressed on his motion. There, Knox, also age 15, was arrested at his home at 9:15 p.m. His father was then at home and he was told he could accompany his son to the station, but the father could not because he was caring for his other younger children. Defendant arrived at the station at 9:30 p.m. As in the present case, the arresting officer notified the police youth division of Knox's presence between 9:45 and 10:00 p.m., but no youth officer appeared. As also asserted in the instant case, Knox was advised of his rights and stated he understood them. Starting about

9:45 p.m., Knox had a 45 minute interview with the police, during which he admitted his involvement in the crime. An assistant State's Attorney was notified. At 1:45 a.m., the assistant State's Attorney again advised Knox of his rights. Knox repeated his confession. His statement was reduced to writing and was read and signed by Knox at 2:21 a.m., after Knox made and initialed corrections in the statement, read it once to himself and again when it was read aloud to him by the assistant State's Attorney. *Knox*, 186 Ill. App. 3d at 809-13.

Knox's mother testified that she was not home when the police came. When she arrived home at 9:40 p.m., she learned her son had been arrested and went to the station, arriving there at about 10:10 p.m. She identified herself at the desk and was told to wait. At 12 p.m., a detective told her that her son had already confessed, that an assistant State's Attorney would have to be called, and that she might as well go home. *Knox*, 186 Ill. App. 3d at 811.

In *Knox*, both the parents and the youth division were notified of Knox's arrest and presence in the station. The appellate court found the fact that neither was actually present during defendant's confession required suppression, first, because Knox's father's opportunity to accompany his son was an "empty" one due to his responsibility for the other children (*Knox*, 186 Ill. App. 3d at 813) and, second, uncontradicted testimony given by his mother established that "the police contributed significantly to eliminating any opportunity defendant had from speaking to his mother at the police station." (*Knox* 186 Ill. App. 3d at 813-14.) Considering this evidence, the court stated:

> "We do not believe such conduct by police is consistent with the great care required where a juvenile's incriminating statement is received. *At worst, the police purposely precluded defendant's mother from contact with defendant by neglecting to see if defendant's mother had arrived until after such time as defendant had completed his confession.* At best, the police simply subjected defendant to the same routine questioning of a criminal suspect without special regard for his youth. Either scenario is impermissible and casts some doubt over the voluntariness of defendant's statement." (Emphasis added.) (*Knox*, 186 Ill. App. 3d at 814.)

The same conclusion is compelled by consideration of the evidence in the instant case.

Here, the ongoing interrogation was part of a pattern of police attempts to question the minor without prior parental counselling. This pattern of conduct started when the police, already interrogating defendant, told the mother not to come to the station; the pattern continued when the mother, desperate to see her daughter, nevertheless came, only to be obstructed from communicating with her daughter until after statements were made, reduced to writing, and signed.

Juveniles possess the same constitutional privilege against self-incrimination as adults; and when juveniles are unaided by counsel, great care "must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." (*In re Gault*, (1967), 387 U.S. 1, 55, 18 L.Ed.2d 527, 561, 87 S. Ct. 1428, 1458.) Further, special care must be taken in scrutinizing the record where a juvenile is involved, since

juveniles could be "easy victim[s] of the law." *Haley v. Ohio* (1948), 332 U.S. 596, 599, 92 L.Ed.2d 224, 228, 68 S. Ct. 302, 303-04; *People v. Travis* (1984), 122 Ill. App. 3d 671, 674, 462 N.E.2d 654.

In another factual setting similar to the present case, *People v. R.B.* (1992), 232 Ill. App. 3d 583, 592-93, 597 N.E.2d 879, the appellate court held:

> "Juvenile confessions are to be carefully reviewed to ensure that they are voluntary and not coerced, suggested, or the product of a juvenile's ignorance of rights, his adolescent fantasy, fright or despair. (*People v. Holcomb* (1989), 192 Ill. App. 3d 158, 548 N.E.2d 613; *People v. Racanelli* (1985), 132 Ill. App. 3d 124, 476 N.E.2d 1179.) The test is whether, under the totality of the circumstances, the statement was made freely, without compulsion or inducement of any sort (*Haynes v. Washington* (1963), 373 U.S. 503, 10 L. Ed. 2d 513, 83 S. Ct, 1336), with consideration given to the characteristics of the accused and the details of the interrogation. (*Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041.) Considering the totality of the circumstances, *and particularly the absence of a youth officer or parent prior to incrimination, we conclude that the trial court improperly denied defendant's motion to suppress his statement and quash arrest.*
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> * * *
>
> This court has stated that the failure to telephone a juvenile defendant's parents, or the absence of a parent during questioning, is a factor in determining voluntariness, but is not determinative of whether defendant's confession should be suppressed. (*People v. Stachelek* (1986), 145 Ill. App. 3d 391, 495 N.E.2d 984; *In re J.S.* (1984), 121 Ill. App. 3d 927, 460 N.E. 2d 412.) However, *where the State failed to take ap-*

propriate steps to ensure that a juvenile defendant had an opportunity to confer with an interested adult, either a parent or a youth officer, this court has held that the police conduct rendered his confession inadmissible." (Emphasis added.) *People v. Knox* (1989), 186 Ill. App. 3d 808, 542 N.E.2d 910. (Emphasis added.)

In *In re J.O.* (1992), 231 Ill. App. 3d 853, 855, 596 N.E. 2d 1285, yet another case involving similar facts, the appellate court held:

"A juvenile's age and the fact that the interrogation occurred in the middle of the night may properly be considered in evaluating the voluntary nature of a confession. (*Haley v. Ohio* (1948), 332 U.S. 596, 92 L. Ed. 224, 68 S. Ct. 302.) *Additionally, if parents have indicated an interest by their presence, then they should be allowed to confer with their children before any questioning begins, as well as be present when any questioning occurs.* (*In re S.D.S.* (1982), 103 Ill. App. 3d 1008, 431 N.E.2d 759.) The presence or absence of a parent is a factor in evaluating the voluntary nature of a confession under the totality of the circumstances test. *In re S.D.S.* (1982), 103 Ill. App. 3d 1008, 431 N.E.2d 759." (Emphasis added.)

In the case *sub judice*, not only was defendant interrogated before having an opportunity to confer with a concerned adult but, worse, any opportunity to do so was effectively frustrated by police. This factor is "material" in determining the voluntariness of defendant's statement. (*Knox*, 186 Ill. App. 3d at 815; *R.B.*, 232 Ill. App. 3d at 594.) In *Knox*, the court concluded:

"Here, however, the failure to have a juvenile officer present is material to determining the voluntariness of defendant's statement. *That failure, in view of the failure to permit defendant's mother an*

opportunity to see her son at the police station, deprived defendant of his only chance to consult with any adult interested in his welfare prior to making a statement. Such is not the type of sensitivity to be accorded to receipt of a minor's statement.

We therefore reverse defendant's convictions and remand the matter for a new trial." (Emphasis added.) *Knox*, 186 Ill. App. 3d at 815-16.

The same result is required in the instant case. The dissent mischaracterizes our decision by charging that we apply a *per se* rule instead of a totality of the circumstances test in determining the voluntariness of defendant's confession. Our decision, however, is not based solely on the fact that defendant was interrogated without the opportunity to confer with a concerned adult. Here, a juvenile defendant, age 15, was interrogated throughout the night as part of a pattern of police conduct designed to elicit a confession, as well as to obstruct parental counselling. Under all these circumstances, the confession was not voluntary. That defendant was tried as an adult is after the material fact.

Notwithstanding the strong evidence of defendant's guilt in this case, reversal is mandated on principle and a new trial is ordered for reasons set forth above.

Since this case must be retried, other assignments of alleged trial error need not be considered here.

Reversed and remanded for a new trial.

McCORMICK, J., concurs.

JUSTICE DiVITO, dissenting:

The majority judgment in this case cannot be reconciled with well-established Illinois law. I therefore respectfully dissent.

The majority errs because (1) it ignores the standard that a trial judge's ruling on a motion to suppress a confession should not be reversed unless it is contrary to the manifest weight of the evidence, and (2) it ignores the standard that the voluntariness of a confession is determined by the totality of the circumstances and that not having either a parent or a youth officer present for a juvenile's confession is merely a consideration which does not automatically render that confession inadmissible.

I. STANDARD OF REVIEW

"The established standard of review of a trial court's finding on a question of the voluntariness of a confession is whether the finding is contrary to the manifest weight of the evidence." (*People v. Melock* (1992), 149 Ill. 2d 423, 448, 599 N.E.2d 941, 951.) Our supreme court has repeatedly stated that "[t]he finding of the trial court on the voluntariness of a confession will not be disturbed unless it can be said that it is contrary to the manifest weight of the evidence." (*People v. Davis* (1983), 97 Ill. 2d 1, 20, 452 N.E.2d 525, 534.) This standard of review applies to a trial court's ruling concerning the admissibility of a juvenile's confession as well. *In re Lamb* (1975), 61 Ill. 2d 383, 388, 336 N.E.2d 753, 756, *cert. denied* (1976), 425 U.S. 938, 48 L. Ed. 2d 180, 96 S. Ct. 1672.

The majority pays no heed to this standard; indeed, it totally ignores it despite its significant application in both *People v. Brown* (1989), 182 Ill. App. 3d 1046, 538

N.E.2d 909, and *In re J.O.* (1992), 231 Ill. App. 3d 853, 596 N.E.2d 1285, cases upon which it relies and which are discussed below.

The classic explanation of the application of the standard, repeated numerous times by our courts, is provided in *In re Application of County Collector* (1978), 59 Ill. App. 3d 494, 375 N.E.2d 553:

> "In order for a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Application of County Collector*, 59 Ill. App. 3d at 499, 375 N.E.2d at 557.

Application of this standard in this case would have mandated affirmance, for it cannot be said that a conclusion opposite that drawn by the trial judge is clearly apparent. As will be demonstrated below, the trial judge's ruling was correct and the *per se* rule applied by the majority is inconsistent with precedent and unjustified by Illinois law.

II. TOTALITY OF CIRCUMSTANCES STANDARD

Our supreme court has stated that "this court has long looked to the 'totality of the circumstances' to determine the voluntariness of any confession." (*People v. Prude* (1977), 66 Ill. 2d 470, 475, 363 N.E.2d 371, 373, *cert. denied* (1977), 434 U.S. 930, 54 L. Ed. 2d 291, 98 S. Ct. 418.) It has stated that "[t]he determination of the question whether or not a confession is [voluntarily given] depends not on any one factor, but upon the totality of all the relevant circumstances." (*People v. Johnson* (1970), 44 Ill. 2d 463, 468, 256 N.E.2d 343, 347, *cert. denied* (1970), 400 U.S. 958, 27 L. Ed. 2d 266, 91 S. Ct. 356.) This standard applies to statements of juveniles as well

as to those of adults. *Prude*, 66 Ill. 2d at 468, 363 N.E.2d at 373; *In re Lamb*, 61 Ill. 2d at 388, 336 N.E.2d at 756.

Every Illinois court that has addressed the issue (*Knox*, discussed below, being the single exception because it does not address the issue) has applied the totality of the circumstances test and rejected the *per se* rule regarding a minor's opportunity to consult with a parent or other person before being questioned: *In re Stiff* (1975), 32 Ill. App. 3d 971, 978, 336 N.E.2d 619, 625 (citing supreme court "totality of circumstances" test, explicitly rejected invitation to adopt *per se* rule when parent is not notified and juvenile is not taken to youth officer); *In re Bertrand* (1978), 65 Ill. App. 3d 703, 705, 382 N.E.2d 660, 662 (totality of circumstances test applied to affirm admission of juvenile's admission to two armed robberies before any effort was made to contact juvenile's parents or youth officer); *People v. Baxtrom* (1980), 81 Ill. App. 3d 653, 660-61, 402 N.E.2d 327, 332 (totality of circumstances test applied; even violation of Juvenile Court Act would not render statement inadmissible); *In re S.D.S.* (1982), 103 Ill. App. 3d 1008, 1012, 431 N.E.2d 759, 762, *cert. denied* (1982), 459 U.S. 869, 74 L. Ed. 2d 128, 103 S. Ct. 153 (*per se* rule not to be followed; voluntariness of confession to be gleaned from totality of circumstances); *In re J.S.* (1984), 121 Ill. App. 3d 927, 936-37, 460 N.E.2d 412, 418-19 (totality of circumstances test applied; failure to notify parent and youth officer merely a consideration in determining voluntariness; juvenile's confession properly admitted); *People v. Clements* (1985), 135 Ill. App. 3d 1001, 1007-08, 482 N.E.2d 675, 680, *cert. denied* (1986), 476 U.S. 1106, 90 L. Ed. 2d 361, 106 S. Ct. 1952, (totality of circumstances test applied; failure to notify guardian of juvenile with below average IQ did

not render confession inadmissible); *People v. Stachelek* (1986), 145 Ill. App. 3d 391, 402-03, 495 N.E.2d 984, 990-91 (totality of circumstances test applied; failure to notify parents did not render statements of juvenile inadmissible; statute "is not meant to immunize minors from police investigation and interrogation"); *People v. Holcomb* (1989), 192 Ill. App. 3d 158, 171-72, 548 N.E.2d 613, 623-24 (unavailability of youth officer does not prevent police from interviewing juvenile, for police have a duty to investigate crimes even where juveniles are involved).

In *People v. Bobe* (1992), 227 Ill. App. 3d 681, 592 N.E. 2d 301, *appeal denied* (1992), 146 Ill. 2d 634, 602 N.E.2d 459, the court held that the statement of a 16-year-old defendant was voluntary, even though the defendant's father and another testified, without contradiction, that his father was not permitted to see him, a juvenile officer was not present during all interviews, and the defendant was handcuffed, unfed, and alone in a room for several hours. *Bobe*, 227 Ill. App. 3d at 705, 592 N.E.2d at 316.

Although some courts have held that the statutory requirement that a parent or a youth officer be notified does not apply when a juvenile is charged as an adult, because the juvenile is not subject to the jurisdiction of the juvenile court but to that of the criminal court (*People v. Sevier* (1992), 230 Ill. App. 3d 1071, 1084, 598 N.E.2d 968, 978; *People v. Green* (1988), 179 Ill. App. 3d 1, 13, 535 N.E.2d 413, 420, *appeal denied* (1989), 127 Ill. 2d 627, 545 N.E.2d 120; *People v. Visnack* (1985), 135 Ill. App. 3d 113, 126, 481 N.E.2d 744, 753), most courts addressing the issue, as indicated in the preceding two paragraphs, hold that failure to comply with the statutory requirement is merely a consideration in determin-

ing admissibility of a juvenile's statements in *either* juvenile or adult proceedings. The majority's decision here is not defensible under either line of cases.

In *People v. Zepeda* (1970), 47 Ill. 2d 23, 265 N.E.2d 647, in construing the section of the Juvenile Court Act requiring parental notification and surrender of the minor defendant to a juvenile officer, our supreme court held that the juvenile defendant's statements in that case were properly admitted despite being taken out of the presence of parents and a juvenile officer. The court held that because the statements of the juvenile had been voluntarily given and with due regard for his constitutional rights, "even if it be assumed that there was a failure to reasonably comply with [the relevant statute] and that such failure caused defendant to be unlawfully detained," those facts would not in themselves invalidate a confession. *Zepeda*, 47 Ill. 2d at 27, 265 N.E.2d at 649.

In *People v. Steptore* (1972), 51 Ill. 2d 208, 281 N.E.2d 642, the police concededly did not comply with Juvenile Court Act provisions that required notice to a parent and surrender to a juvenile officer. Nevertheless, our supreme court held that because the juvenile defendant was told of his rights to silence and to have counsel present and he understood them, "[u]nder the circumstances failure to comply with [the relevant statute] did not render the statement inadmissible." *Steptore*, 51 Ill. 2d at 214-15, 281 N.E.2d at 645.

Illinois' rejection of the *per se* rule is understandable. Although a requested attorney must be present for custodial questioning, there is no requirement—constitutional, statutory, or case law—that a parent or youth officer be present for questioning of a minor. The statute

in question here[1] requires only the *notification* of a parent or guardian and that the minor be taken to a youth officer. As our supreme court said in *Zepeda*, "Nothing in [the statute], or in any other provision of the [Juvenile Court] Act, imposes sanctions for a failure to comply and, under the rule long adhered to by this court, unlawful detention will not, of itself, invalidate a confession or statement of an accused." (*Zepeda*, 47 Ill. 2d at 27, 265 N.E.2d at 649.) It is thus not surprising that the well-established standard in Illinois is that any violation of the statute is merely a consideration in weighing the totality of circumstances.

Interestingly, the majority does not say it is applying a *per se* rule.[2] Instead, quoting *Knox*, it twice says that

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[1] The relevant statute reads as follows:

> "A law enforcement officer who takes a minor into custody without a warrant *** shall, if the minor is not released, immediately make a reasonable attempt to notify the parent or other person legally responsible for the minor's care or the person with whom the minor resides that the minor has been taken into custody and where the minor is being held; and the law enforcement officer shall without unnecessary delay take the minor to the nearest juvenile police officer designated for such purposes in the county of venue or shall surrender the minor to a juvenile police officer in the city or village where the offense is alleged to have been committed." 705 ILCS 405/5-6(2) (West 1992).

[2] In response to this dissent, the majority specifically denies applying a *per se* rule. (273 Ill. App. 3d at 855.) For the first time in its analysis, and only in connection with this denial, does the majority concede the existence of the standard of the "totality of the circumstances test in determining the voluntariness of defendant's confession." (273 Ill. App. 3d at 855.) The majority's additional basis for finding the statements

(continued...)

the alleged refusal to allow defendant's mother to see defendant was "material" in determining the voluntariness of defendant's statement. (273 Ill. App. 3d at 852, 854.) If "material" is code for *per se*, the majority's judgment, though incorrect, is at least logical. If "material" is merely descriptive of the kind of "consideration" the evidence merits, the majority's conclusion cannot be justified.

In reaching its judgment, the majority ignores every case cited in this section. More important, it ignores the well-established principles supplied by those cases. Inexplicably, it also ignores the fact that even defense counsel, while arguing for suppression of the confession before the trial judge, invoked the totality of circumstances test and conceded that the absence of defendant's mother and a youth officer was only a factor to be considered.

III. DETERMINATION OF VOLUNTARINESS IN THIS CASE

(a) *The Evidence*

The evidence is critical in applying the correct standards to a case such as this. For that reason, a summary of the relevant testimony at the suppression hearing and at trial follows. *People v. King* (1986), 109 Ill. 2d 514, 525, 488 N.E.2d 949, 955, *cert. denied* (1986), 479 U.S.

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[2] (...continued)
involuntary (that defendant "was interrogated throughout the night as part of a pattern of police conduct designed to elicit a confession") (273 Ill. App. 3d at 855) is not supported by the record and is contrary to the trial judge's findings. Indeed, that basis represents nothing more than the *per se* rule bolstered by conclusional statements designed to comply with the totality of circumstances test.

872, 93 L. Ed. 2d 173, 107 S. Ct. 249 (on review, evidence presented at trial may be considered in addition to evidence presented at suppression hearing.)

At the suppression hearing, four witnesses testified: Detective Ernest Halvorsen, youth officer Robert Pulia, and Assistant State's Attorney John Dillon for the State; and Sandra Lorenzi, defendant's mother, for defendant.

Detective Halvorsen testified that he contacted the 14th District and requested that a beat car go to the home of defendant's mother to tell her that defendant was at Area 5. Each of the State's witnesses testified that he or she had been informed that defendant's mother had been notified of defendant's arrest. Detective Halvorsen testified that between 9:30 and 10 p.m. he learned that the youth officer from the 25th District was otherwise occupied and that an Area 5 youth officer would not be available until midnight. Defendant was not handcuffed. The State's witnesses testified that defendant was sober and coherent, did not appear under the influence of drugs or alcohol, did not smell of drugs or alcohol, understood questions, and was responsive to them. Each of the three State witnesses, at various times, gave defendant *Miranda* warnings at least once; on each occasion defendant said she understood her rights. She was given cigarettes. She asked for and was given a soda; later she asked for and was given food. She privately told the assistant State's Attorney that "she had been treated well and she had no complaints." The youth officer was present for all of defendant's interrogations except the first. Detective Halvorsen was never told that defendant's mother wanted to see defendant; when they were in the open area of the police station, none of the three State witnesses was aware of anyone desiring to see defendant.

Defendant gave Detectives Halvorsen and Renaldo Guevara an oral statement, which lasted 20 to 30 minutes, starting at about 10 p.m.; she gave the assistant State's Attorney an oral statement, which lasted 20 to 30 minutes, starting at about 1:15 a.m.; she gave the statement to the court reporter, which lasted about 10 minutes, starting at about 5:15 a.m.; and she read, corrected, and signed each page of the transcribed statement, which was 11 pages long, starting at about 6:20 a.m. The assistant State's Attorney had her read the first portion of her statement aloud to satisfy himself that she could read English. Sitting next to her, he then read it aloud as she followed along. During this time she made corrections on the statement, initialled the corrections, and signed each page. This process took approximately 15 to 20 minutes. A photograph taken of defendant immediately after she signed the statement, showing her "with a big smile," was signed by her and admitted into evidence.

In her statement to the court reporter, defendant was advised of her *Miranda* rights and waived them. She said she had been treated well by the police and the assistant State's Attorney, had not been promised anything, had not been threatened in any way, and had been given food and cigarettes. She said that she was a member of the Maniac Latin Disciples street gang. On the day of the killings, she met with fellow female gang members "Muneca" and "Tuti" to plan "a mission" to get revenge for the killing of "Mudo," a fellow male gang member who had been killed by the Latin Kings, an enemy gang, a couple of days before. She had a .25-caliber automatic. They drove in the car of "Rabbit," the brother of Muneca, to the area of the Latin Kings. They

looked for Latin Kings and finally met Jimmy Cruz, whom she knew, and Hector Reyes, whom she had met previously. They were Latin Kings. They were in another car and agreed to meet in Humboldt Park "to catch a buzz." At the park, they left their cars and walked. She walked with Cruz until they arrived at a washroom. Reyes said he needed to use the washroom, and she walked in with him. They kissed in the washroom for a couple of minutes. When Reyes turned his back to use the toilet, she shot him in the back of the head. After leaving the washroom, she gave the gun to Muneca. Tuti, who was walking hand in hand with Cruz, gave Muneca a signal, and Muneca went up to Cruz and shot him in the back of the head. Defendant "[s]howed [her] respect" for Cruz and then drove with her friends to her gang's area. There she told her fellow gang members what they had done and they celebrated with marijuana and beer.

Detective Anthony Riccio testified at trial that at about 9 a.m. he took defendant from the interview room. When she saw television cameras outside the room, defendant said, "What is up with these cameras?" She then said "Disciple thing" and gave the sign of the Maniac Latin Disciples, a pitchfork in an upright position. As she entered an office, she said, "Maniac" and then "K.K.," which meant "King Killer." Riccio testified that defendant was sober, alert, and able to understand directions "completely." A videotape showing defendant, her actions, and her words was then played for the jury.

Defendant's mother testified that two plainclothes detectives came to her home at about 10 or 10:15 p.m. One of them was a "Spanish guy." They "pounded" on the door and "came with some guns in their hands." They scared her and her baby and told them to go into another

room because "they needed to talk to [her] husband" for whom they specifically asked by asking him if he was William Burrell. They told him that his daughter called him. When she heard her daughter's name she came out of the other room and said, "no it wasn't like that." The officer said that her daughter had seen a murder and "[t]hat he had her in custody, whatever, protective custody." He gave her the correct address of the place where she was in custody. The officer then told her that defendant "had called the house and that she seen the murder, and it was a lie because she talked to me." The officer then told her that defendant was in custody; she was involved in a murder. At the hearing, she testified the police were there about an hour and left "[a]bout 11, 12"; at trial she testified the police were there "maybe an hour, an hour and a half" and left at "maybe eleven, 11:15."

Defendant's mother then testified that she waited at home because the police had told her not to go to the police station and that they would call her when she could go. Though she received no call, she went to the police station with a girlfriend at about 2 a.m. About 10 minutes after arriving, she went upstairs and was told by the same Spanish officer who had been to her home that she "couldn't go in there." She went downstairs for about 1 1/2 hours, and at "[a]bout 3:00, 3:15" (she had her watch on so she knew the time), the same officer told her "that I had to get the hell out of there because they were talking to her." She finally saw her daughter at 8:30 a.m. At first her daughter did not know who she was. Her daughter was gagging and she could not understand her. She could understand her speech "[v]ery little, very little." Her daughter's face and eyes "were all

pushed out like she would have been high." She believed her daughter had been on drugs or alcohol that morning.

On cross-examination, defendant's mother testified that defendant did not live at home. She was living in a foster home, but she was a runaway from that home at the time. As for the girlfriend who accompanied her to the police station, "[s]he got beat up with the gangs so she left town" and she had not talked to her for about five months. At trial, when shown the photograph taken of her daughter immediately after the statement to the court reporter, she said her daughter looked worse than she did in the picture, "[h]er hair was all messed up and everything." Nevertheless, she testified, "[y]ou can tell she was high there too, but not that much."

(b) *Cases Cited by the Majority*

Except for a single aberration, the cases cited by the majority directly support the opposite conclusion or are distinguishable.

In *People v. Brown* (1989), 182 Ill. App. 3d 1046, 538 N.E.2d 909 (273 Ill. App. 3d at 851), for example, the appeal was brought by the State following the granting of a motion to suppress in the circuit court. While the majority correctly quotes from the decision (273 Ill. App. 3d at 851), immediately following the quoted portion the appellate court states that the failure to advise a concerned adult was merely a *consideration* in evaluating the voluntariness of a juvenile's statement or confession. Using the defendant's inability to confer with his mother as a consideration, *combined with* the failure of the police to advise the defendant of his *Miranda* rights, the court concluded that the trial judge's finding that the

statement was coerced was not against the manifest weight of the evidence. *Brown*, quoted by the majority solely for its out-of-context language, thus does what the majority fails to do: it utilizes the proper standard of review and applies the totality of circumstances test. Proper application of *Brown* would have supported affirmance of the trial judge's ruling here, for it too was not against the manifest weight of the evidence.

The majority says *People v. R.B.* (1992), 232 Ill. App. 3d 583, 597 N.E.2d 879 (273 Ill. App. 3d at 853-54), presents "another factual setting similar to the present case." (273 Ill. App. 3d at 853.) It neglects to point out, however, that there the appellate court concluded that the defendant had been arrested without probable cause. In considering whether sufficient attenuation existed to purge the defendant's statement from the taint of his illegal seizure, the court concluded that the evidence did not show that the defendant waived his *Miranda* rights. The court's discussion of the failure of the police to contact a parent or a youth officer was connected to the attenuation issue and in the context of a juvenile having been *illegally* arrested. The instant case bears no resemblance to *R.B.*

In re J.O. (1992), 231 Ill. App. 3d 853, 596 N.E.2d 1285 (273 Ill. App. 3d at 854), is another case in which the State appealed the circuit court's suppression order. On appeal, the State contended that the circuit court had erred in suppressing the juvenile's confession solely because his parents had been denied the right to see him; the State thus argued that the circuit court had erred by applying a *per se* rule. The appellate court said that "there is no *per se* rule that juveniles must be allowed to consult with their parents prior to questioning." (231 Ill.

App. 3d at 854.) The court also stated that "it is well settled that the voluntariness of a juvenile's confession is to be determined by the totality of the circumstances." (*J.O.*, 231 Ill. App. 3d at 854, 596 N.E.2d at 1286-87.) It then evaluated the circuit court's ruling using the totality of the circumstances standard, and concluded that the circuit court had applied a totality of circumstances standard and not a *per se* standard and thus affirmed the circuit court's suppression order. Again the majority quotes the appellate court's statement out of context, making it appear to support its position when in fact it does exactly the opposite.

Both *People v. Cole* (1988), 168 Ill. App. 3d 172, 522 N.E.2d 635, *appeal denied* (1988), 122 Ill. 2d 582, 530 N.E.2d 253 (273 Ill. App. 3d at 850), and *People v. McGhee* (1987), 154 Ill. App. 3d 232, 507 N.E.2d 33, *appeal denied* (1987), 116 Ill. 2d 570, 515 N.E.2d 120 (273 Ill. App. 3d at 850), are contrary to the majority's judgment. In *Cole*, the court suppressed a juvenile's confession because of an illegal arrest and recognized that failure to notify a parent or to have a youth officer present was properly considered, "but that a violation of the statute was not a *per se* denial of a juvenile's constitutional rights." (*Cole*, 168 Ill. App. 3d at 181, 522 N.E.2d at 640.) In *McGhee*, the court, in suppressing the confession of a juvenile because of an illegal arrest, applied the totality of circumstances test and said that denying the juvenile's mother the opportunity to see him and not having a youth officer present "does not *per se* constitute a denial of the defendant's rights." *McGhee*, 154 Ill. App. 3d at 236-37, 507 N.E.2d at 35.

People v. Knox (1989), 186 Ill. App. 3d 808, 542 N.E.2d 910, *appeal denied* (1989), 127 Ill.2d 630, 545 N.E.2d

122, the primary case relied upon by the majority (273 Ill. App. 3d at 852-53, 854-55), is an aberration from the line of cases deciding this issue. In *Knox* a panel of the appellate court reversed the circuit court, without citation to authority regarding its ultimate holding, without considering the manifest weight of the evidence standard of review, and without reference to the principle that the failure to notify a parent or a youth officer is merely one consideration in the evaluation of the voluntariness of a juvenile's statement or confession. Without saying so, the *Knox* court applied a *per se* rule, contrary to every other case addressing this issue. The majority finds this aberrant case persuasive, but it should not be followed.

(c) ***Application of Correct Standards to This Case***

The record in this case discloses that the trial judge applied the correct totality of circumstances test in ruling that defendant's statements were admissible. Our review of the correctness of the judge's ruling, by application of the against the manifest weight of the evidence test, compels affirmance. The fact that defendant's mother was allegedly unable to speak to defendant prior to interrogation is one factor to consider in the totality of the circumstances, as is the fact that a youth officer was not present when defendant gave her first statement. These factors are overridden, however, by the remainder of the evidence which showed that defendant's confession was freely given, without threats, promises, inducements, or physical coercion. Defendant was given food when she requested it, treated well by the police, and had no complaints about her treatment. She could read and understand English, she understood her written statement, she made corrections to it, and she signed it. She did not

appear to the officers, the assistant State's Attorney, or the youth officer to be under the influence of alcohol or other drugs. There was no evidence that she asked to speak to her mother. The clarity of her statements, particularly the detail contained in the statement given to the court reporter, belied the testimony of her mother that she was nearly incomprehensible. The bravado displayed by defendant for the sake of television cameras, a videotape of which was shown to the jury, also belied her mother's testimony and was consistent with the conscious actions of a defiant person who was in control, not those of a youngster in a coercive environment.

The majority relies heavily on the fact that no one was called to rebut the testimony of defendant's mother. Without regard to the inherent difficulties in proving a negative and without regard to the fact that everyone addressing this issue in the circuit court—judge, prosecutor, and defense attorney—applied the totality of circumstances test and saw the noncontact between mother and defendant as only a consideration, the majority places too much reliance on the fact that the evidence was uncontradicted. The circuit court is in a superior position to evaluate a witness' credibility when it hears a motion to suppress, and it need not accept the defendant's version of the circumstances in preference to another version. *People v. Cleesen* (1988), 177 Ill. App.3d 103, 113, 531 N.E.2d 1113, 1119.

Indeed, much of defendant's mother's testimony was incredible. Did the police officers, charged only with the responsibility of notifying the mother of her daughter's whereabouts, really enter her home with drawn guns? Did they refuse to talk to her and insist only on talking to her husband? Did they stay for at least an hour? Why

did the police go to her house at all if they did not want her to know that her daughter was in custody and where she could be seen? Did police deny her access to her daughter until 8:30 a.m., even though all statements had been completed by 6:40 a.m.? At 8:30 a.m., after having given a coherent statement to a court reporter and minutes before performing for television cameras, was her daughter gagging, incomprehensible, and unaware?

Although pointing out "the danger of cursory application of principles to facts" (273 Ill. App. 3d at 850), without analysis the majority suppresses all of defendant's statements, through its broad application of its *per se* rule. In doing so, the majority leaves important questions unanswered. For example, in view of the evidence that the detectives were talking to defendant at about the same time other officers were visiting her mother, can it be said that defendant's first statement was tainted by her mother's allegation that she was told not to go to the police station until she was called? If so, the majority's unarticulated *per se* rule is even broader than it first appears. Also, in view of the fact that defendant had already given her oral statement to the assistant State's Attorney by the time defendant's mother arrived at the police station at 2 a.m., how was that statement tainted by the alleged rebuff of her mother at the police station?

Considering the totality of the circumstances, there is ample evidence in the record to support the trial judge's determination even if it be conceded, for the sake of argument, that defendant's mother was denied access to her. Since the opposite conclusion is not clearly apparent, the ruling of the trial judge on the motion to suppress should be upheld and the judgment in this case should be affirmed.

APPENDIX B

ILLINOIS SUPREME COURT
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December 6, 1995

Hon. Jack O'Malley
State's Attorney Cook Co., Crim Appeals Div.
309 Richard J. Daley Center
Chicago, IL 60602

No. 79541 People State of Illinois, petitioner, v. Jacqueline Montanez, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 28, 1995.

Supreme Court, U.S.
FILED
MAY 9 1996
CLERK

(2)

NO. 95-1436

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

PEOPLE OF THE STATE OF ILLINOIS,

Petitioners,

v.

JOHN KIMERY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF IN OPPOSITION

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42 pp

QUESTIONS PRESENTED FROM REVIEW

1) Whether prior punishment in a forfeiture action bars further punishment in a criminal action for the same offense under the double jeopardy clause in the Fifth Amendment to the Constitution of the United States (US Const. Amend. V).

2) Whether forfeiture is an offense or is punishment for an offense.

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CONSTITUTIONAL PROVISIONS AND STATUTES

1) The Fifth Amendment to the Constitution of the United States (Complete text Appendix A, pertinent provisions are):

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." (US Const. Amend. V).

2) Section 2 of the Illinois Drug Asset Forfeiture Procedure Act (720 ILCS 150/2) (Complete text Appendix B, pertinent provisions are):

> Sec. 2: Legislative Declaration: the General Assembly finds that the civil forfeiture of property which is used, or intended to be used in, is attributable to, or facilitates the manufacture, sale, transportation, distribution, possession, or use of

substances in certain violations of the Illinois Controlled Substances Act (720 ILCS 570/100 et seq.) or the Cannabis Control Act (720 ILCS 550/1 et seq.) will have a significant beneficial effect in deterring the residing incidence of the abuse and trafficking of such substances within this State . . ."

3) Section 505(a) of the Illinois Controlled Substances Act (720 ILCS 570/505(a)) (Complete text Appendix C; pertinent provisions are):

"Sec. 505(a): The following are subject to forfeiture:

3) all conveyances including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of

property described in paragraphs 1) and 2) but; . . ."

REASONS RELIED ON FOR DENYING THE PETITION FOR A WRIT

ARGUMENT

Respondent, JOHN KIMERY, opines that all issues presented for review by Petitioner are adequately analyzed and answered by the opinion of the Supreme Court of Illinois, (Appendix A to Petition for Writ) and by the opinion of the Appellate Court of Illinois, Second Judicial District (Appendix C to Petition for Writ); so Respondent did not file a prior response; and files this Response as requested by this Court.

I.

FORFEITURE IS QUASI-CRIMINAL IN NATURE AND THE DOUBLE JEOPARDY CLAUSE IN THE FIFTH AMENDMENT BARS TWO PUNISHMENTS FOR THE SAME OFFENSE.

There were two separate prosecutions of Respondent, JOHN KIMERY, and two separate punishments imposed on him in the Circuit Court for the 16th Judicial Circuit, Kane County, Illinois, in violation of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States (US Const. Amend. V). North Carolina v. Pearce, 395 U.S. 711; 89 S.Ct. 2172; 23 L.Ed.2d 656, 694 (1969); United States v. Halper, 490 U.S. 435, 440; 109 S.Ct. 1892; 104 L.Ed.2d 487, 496 (1989); Green v. United States, 355 U.S. 184; 78 S.Ct. 221; 2 L.Ed.2d 199, 204 (1957); Abbate v. United States, 359 U.S. 187, 198-199; 79 S.Ct. 666; 3 L.Ed.2d 729, 736 (1959); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1215 (9th Cir. 1994).

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall . . . be subject to the same offense to be twice put in jeopardy of life and limb . . ."
> (US Const. Amend. V)

In Pearce, (ibid; 23 L.Ed.2d 656, 694) and Halper, (ibid 104 L.Ed.2d 487, 496) this Court said that a person can not be twice prosecuted, or twice punished for the same offense.

In Green, (ibid; 2 L.Ed.2d 199, 204), and Abbate, (ibid; 3 L.Ed.2d 729, 736), this Court said that a person should not be subject to prosecution or required to defend himself more than once against charges based on the same alleged criminal conduct. See also, United States v. $405,089.23 U.S. Currency, (ibid; 33 F.3d 1210, 1215).

The proscription in the double jeopardy clause of the Fifth Amendment (US Const. Amend. V) against multiple punishments for the same offense is not of recent origin but has been better understood since the trilogy of United States v. Halper, 490 U.S. 435; 109 S.Ct. 1892; 104 L.Ed.2d 487 (1989); Austin v. United States, 509 U.S. ___; 113 S.Ct. 2801; 125 L.Ed.2d 488 (1993); and Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ___; 114 S.Ct. 1937; 128 L.Ed.2d 767 (1994); and should be duly respected to the extent of dismissing criminal charges when appropriate. Forfeitures frequently cause multiple punishment for the same offense in violations of the double jeopardy clause in the Fifth Amendment to the Constitution of the United States (US Const. Amend. V) and should be closely scrutinized since

legislatures have realized the revenue producing capability of forfeiture and have extended forfeiture in many previously unheard of directions. United States v. James Daniel Good Real Property, 510 U.S. ___; 114 S.Ct. 492; 126 L.Ed.2d 490, 504, 505 (1993).

In United States v. Halper, 490 U.S. 435, 440; 109 S.Ct. 1892; 104 L.Ed.2d 487, 496 (1989), this Court said:

> "As early as 1641, the Colony of Massachusetts in its "Body of Liberties" stated: "no man shall be twice sentenced by Civil Justice for one and the same crime, offense, or trespass" . . .
>
> "In our case law too, this Court, over a century ago, observed: If there is anything settled in the jurisprudence of England and America, it is that no man can be twice

lawfully punished "for the same offense. Ex parte Lange, 18 Wall 163, 168; 21 L.Ed 872 (1874)."

Respondent, JOHN KIMERY, contends that he was twice punished for the same offense.

On November 17, 1991, the State of Illinois commenced a separate action in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, as No. 91 MR 438, to forfeit a 1982 Maroon Ford Mustang owned by Respondent, JOHN KIMERY (K SC 1-A), and alleged that on October 6, 1991, Respondent allegedly drove his automobile to 1115-1119 Kane Street, Aurora, Illinois, and there purchased for forty dollars ($40.00) from LARRY HARRIS a small plastic bag containing a white powdery substance which field tested for cocaine (K SC 1-A).

On May 26, 1992, after a bench trial, Judge James Quetsch ordered that Respondent's 1982 Maroon Ford Mustang was forfeited to the Director of the Illinois State Police for disposition (K SC 40, 41); and on February 22, 1994, the Appellate Court of Illinois for the Second Judicial District affirmed Judge Quetsch's forfeiture order. People v. One 1982 Maroon Ford Mustang, (2d Dist. 1994), 258 Ill.App.3d 127.

On October 22, 1991, in a separate proceeding, the State of Illinois indicted Respondent, JOHN KIMERY, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, as No. 91 CF 1649, for unlawful possession of the same alleged controlled substance (cocaine) weighing less than 15 grams (a Class 4 Felony) which Respondent allegedly

purchased from LARRY HARRIS on October 6, 1991 (K C 5).

On April 12, 1993, Respondent waived a jury trial and pled guilty to the criminal charges pending against him for unlawful possession of a controlled substance (cocaine) (K C 53, 54).

On July 8, 1993, after the decision of this Court in Austin v. United States, 509 U.S. ___; 113 S.Ct. 2801; 125 L.Ed.2d 488 (1993), and before sentencing, Respondent, JOHN KIMERY, moved to withdraw his guilty plea and to dismiss the criminal charges pending against him on the grounds of double jeopardy resulting from the prior forfeiture of his 1982 Maroon Ford Mustang on May 25, 1992. (K C 58, 63).

On October 15, 1993, Judge Barry Puklin denied Respondent's Motion and sentenced Respondent to imprisonment for

one year (K C 83, 89). The Appellate Court of Illinois for the Second Judicial District reversed Judge Puklin and dismissed the criminal charges against Respondent.

It is illusory to perceive that these two separate civil and criminal proceedings at different times before different judges were a single prosecution as Petitioner, STATE OF ILLINOIS, suggests.

Two (2) historical concepts control whether Respondent, JOHN KIMERY, was twice punished for the same offense:

First: Forfeiture of Respondent's 1982 Maroon Ford Mustang, although filed and labeled as a civil action (91 MR 438) (K SC 1-A) is criminal in nature and Constitutional protection in criminal cases applies. Boyd v. United States, 116 U.S. 611, 633, 634; 6 S.Ct. 524; 29

L.Ed.2d 746, 752 (1885); United States v. Halper, 490 U.S. 435, 447, 448; 109 S.Ct. 1892; 104 L.Ed.2d 487, 501 (1989); United States v. U.S. Coin and Currency, 401 U.S. 715, 718; 91 S.Ct. 1041; 28 L.Ed.2d 434, 437-439 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696; 85 S.Ct. 1246; 14 L.Ed.2d 170, 173, 174 (1965).

Second: Forfeiture of Respondent's 1982 Maroon Ford Mustang was intended by the legislature to deter drug activity; so forfeiture of Respondent's automobile was punishment. Section 2 of the Illinois Drug Asset forfeiture Procedure Act (725 ILCS 150/2); Austin v. United States, 509 U.S. ___; 113 S.Ct. 2801; 125 L.Ed.2d 488, 497, 498 (1993); United States v. Halper, 490 U.S. 435, 448, 449; 109 S.Ct. 1892; 104 L.Ed.2d 487, 501, 502 (1989).

In Austin, (ibid; 125 L.Ed.2d 488, 503), this Court said:

"We conclude therefore that forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment."

In Halper, (ibid; 104 L.Ed.2d 487, 501), this Court said:

"Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment . . . (104 L.Ed.2d 487 at 502). . . . a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained as also serving either retributive or deterrent purposes is punishment as we have come to understand the term."

Section 2 of the Illinois Drug Asset Forfeiture Procedure Act (725 ILCS 150/2) provides:

> "Sec. 2: Legislative Declaration: The General Assembly finds that the civil forfeiture of property which is used or intended to be used in, is attributable to, or facilitates the "manufacture, sale, transportation, distribution, possession or use of substances in certain violations of the Illinois Controlled Substances Act (720 ILCS 570/100, et seq.) or the Cannabis Control Act (720 ILCS 550/1, et seq.) will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State . . ."

Since forfeiture under Section 2 of the Illinois Drug Asset Forfeiture Procedure Act (725 ILCS 150/2) is intended to deter, forfeiture under this Act is punishment.

Both Halper and Austin were decided under the excessive fines clause of the Eighth Amendment to the Constitution of the United States which provides:

> "Excessive bail shall not be required, nor excessive fines imposed . . ." (US Const. Amend. VIII).

Halper was an action to collect a fixed penalty in the amount of $130,000 provided by statute for medicare fraud.

Austin was an action to forfeit a mobile home and body shop for a casual delivery of a small amount of cocaine (two (2) grams) in the body shop.

Petitioner, STATE OF ILLINOIS, argues (Pet. P. 7, 8) that Austin was decided

under the Eighth Amendment to the Constitution of the United States (US Const. Amend. VIII); and that this Court did not grapple with and settle the double jeopardy argument under the Fifth Amendment to the Constitution of the United States (US Const. Amend. V).

It is true that most of this Court's discussion in Austin explained why forfeiture is punishment; but the State's argument overlooks that much of this Court's discussion in United States v. Halper, 490 U.S. 435; 109 S.Ct. 1892; 104 L.Ed.2d 487, 496, 497, 501, 502, dealt with punishment under the double jeopardy clause of the Fifth Amendment to the Constitution of the United States (US Const. Amend. V) and concluded:

> "We therefore hold that under the double jeopardy clause a defendant who already has been punished in a

> criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only a deterrent or retribution." Halper, (ibid; 104 L.Ed.2d 487 at page 502).

This language indicates that this Court grappled with the double jeopardy issue and concluded that a person may not be twice punished for the same offense by separate criminal and civil proceedings.

This Court reached the same conclusion in Coffey v. United States, 116 U.S. 435, 445; 6 S.Ct. 437; 29 L.Ed. 684, 687 (1865).

Petitioner, STATE OF ILLINOIS, suggests that respecting the Fifth Amendment to the Constitution of the United States (US Const. Amend. V) proscribing multiple punishments for the

same offense requires dismissal of the criminal proceedings against Respondent since forfeiture of his 1982 Maroon Ford Mustang occurred first and was a prior punishment (Pet. p. 8). This suggestion should be addressed to the Legislature and not to the Courts. Respondent respectfully submits that this Court cannot be unmindful of the prevailing attitude of many Legislators that they can ignore substantive Constitutional rights as expediency or political action dictates.

In United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), the United States Court of Appeals for the Sixth Circuit held that a prior forfeiture of property was prior punishment and barred subsequent criminal prosecution for the same underlying criminal offense.

On the other hand, in United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit held that a prior criminal conviction and sentence was a prior punishment and barred subsequent forfeiture of property for the same offense.

Undoubtedly the legislature may provide for alternative multiple punishments in the same criminal proceeding. United States v. Halper, (1989), 490 U.S. 435, 451; 109 S.Ct. 1892; 104 L.Ed.2d 487, 503; Missouri v. Hunter, 459 U.S. 359, 366-369; 103 S.Ct. 673; 74 L.Ed.2d 535, 542-543 (1983). The Illinois Legislature has done this by providing fines, imprisonment, periodic imprisonment, probation, supervision, community service, and restitution as sentencing alternatives in criminal cases.

(730 ILCS 5/5-5-3). The Legislature can include forfeiture as one of the sentencing alternatives. But the legislature cannot provide for a separate prosecution for each punishment. Halper, (ibid; 104 L.Ed.2d 487, 503); United States v. $405,089.23 U.S. Currency, (9th Cir. 1994), 33 F.3d 1210, 1215; Green v. United States, 355 U.S. 184; 78 S.Ct. 221; 2 L.Ed.2d 199, 204 (1957); Abbate v. United States, 359 U.S. 187, 198-199; 79 S.Ct. 666; 3 L.Ed.2d 729, 736 (1959).

Respondent respectfully submits that separate prosecutions with separate punishment imposed by different Judges (as in this case Judge Quetsch (civil 91 MR 438) and Judge Puklin (criminal 91 CF 1649)) is not one single coordinated prosecution as Petitioner, STATE OF ILLINOIS, suggests and can result in excessive punishment. In such cases

mitigating factors are not persuasive, and each Judge is inclined to enhance the penalty. Each alternative multiple punishment when separately imposed in a separate prosecution will appear less severe than when cumulated and considered together in one prosecution (as in this case one year imprisonment (K SC 83, 89) and forfeiture of an automobile (K SC 40, 41) for possession of a small amount of cocaine ($40.00 worth) for personal use).

Petitioner, STATE OF ILLINOIS, cites United States v. Millan, (2d Cir. 1993), 2 F.3d 17, to justify separate criminal and civil prosecutions. Millan, (ibid; 2 F.3d 17), represents a minority opinion; the majority opinions distinguish or refuse to follow Millan. United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1215 (9th Cir. 1994); United States v. Ursery, 59 F.3d 568, 574 (6th Cir. 1995);

United States v. Torres, 28 F.3d 1463, 1465 (7th Cir. 1994); United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado, (May) ____ F.3d ___, (Cons. No. 1285-1290, 10th Cir., February 2, 1996); United States v. Brophil, 899 F.Supp. 1257 (1995).

II.

THE SAME ELEMENTS ARE INCLUDED IN FORFEITURE FOR CRIMINAL ACTIVITY AND IN THE UNDERLYING CRIMINAL ACTIVITY.

The criminal charges against Respondent, JOHN KIMERY, (KC 5), and forfeiture of his 1982 Maroon Ford Mustang (K SC 40, 41) arose out of the same alleged criminal conduct, i.e. the alleged unlawful possession by Respondent of an alleged controlled substance (cocaine) which Respondent allegedly purchased from LARRY HARRIS (K SC 1-A).

Petitioner, STATE OF ILLINOIS,

suggests that the criminal charges against Respondent and forfeiture of his automobile have different elements so are not the same offense.

The issue is not whether the criminal charges against Respondent and forfeiture of his automobile have the same elements and are the same offense but whether his automobile was used in commission of the underlying criminal offense so that forfeiture of his automobile was prior punishment for the same criminal activity. (720 ILCS 570/505(a)(3)). Forfeiture is punishment for a criminal offense and not a separate criminal offense. Fines and imprisonment are not elements of criminal offenses but they are punishment for the offense.

Petitioner, STATE OF ILLINOIS, misapprehends Blockburger v. United States, 284 U.S. 299, 304; 52 S.Ct. 180,

182; 76 L.Ed.2d 306 (1982). For two (2) offenses to be separate offenses, both must include a different element which the other does not. But two (2) offenses are not separate offenses just because one includes more elements than the other. United States v. Ursery, 59 F.3d 568- (6th Cir. 1995), and United States v. 9844 S. Titan Court, Unit 9, Littleton, Colorado, (May), ___ F.3d ____ (Cons. No. 1285-1290, 10th Cir., February 2, 1996).

An automobile is not contraband per se. Before an automobile can be forfeited, it must be tainted by some underlying criminal activity; and thus become derivative contraband; therefore, the underlying criminal activity (in this case the alleged unlawful possession by Respondent in his automobile of the same alleged controlled substance (cocaine) which he purchased from LARRY HARRIS) is

an element of the forfeiture of Respondent's 1982 Maroon Ford Mustang. One 1958 Plymouth Sedan v. Pennsylvania, 306 U.S. 693, 699; 85 S.Ct. 1246; 14 L.Ed.2d 170, 174 (1965).

Respondent's automobile may not be an element of the criminal charge against Respondent for alleged unlawful possession of a controlled substance (cocaine); but the underlying criminal charge against Respondent for alleged unlawful possession of a controlled substance in his automobile is a sine qua non element of the forfeiture of Respondent's 1982 Maroon Ford Mustang, (viz. using his automobile to facilitate possession of the same unlawful controlled substance) (720 ILCS 570/505(a)(3) without which Respondent's automobile could not have been forfeited.

CONCLUSION

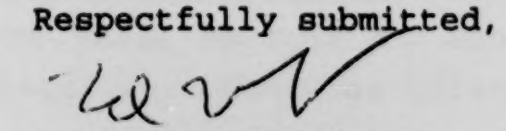
Civil forfeiture of Respondent's 1982 Maroon Ford Mustang was a prior punishment for the underlying alleged unlawful possession of a controlled substance (cocaine) which Respondent, JOHN KIMERY, allegedly purchased from LARRY HARRIS.

The Supreme Court of Illinois correctly decided that forfeiture of Respondent's automobile was a prior punishment; and that Respondent was being twice punished for the same offense and properly dismissed the criminal charges against him.

WHEREFORE, the Respondent, JOHN KIMERY, respectfully requests that this Court deny the Petition of Petitioner, THE STATE OF ILLINOIS, for a Writ of

Certiorari to review the decision of the Supreme Court of Illinois.

Respectfully submitted,



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APPENDIX

APPENDIX A-1

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." (US Const. Amend. V).

APPENDIX B-1

STATUTES

Section 2 of the Illinois Drug Asset Forfeiture Procedure Act (725 ILCS 150/2):

"Sec. 2: Legislative Declaration: The General Assembly finds that the civil forfeiture of property which is used or intended to be used in, is attributable to, or facilitates the manufacture, sale, transportation, distribution, possession, or use of substances in certain violations of the Illinois Controlled Substances Act (720 ILCS 570/100 et seq.) or the Cannabis Control Act (720 ILCS 550/1 et seq.) will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State. While forfeiture may secure for state and local units of government some resources for deterring drug abuse and drug trafficking, forfeiture is not intended to be an alternative means of funding the administration of criminal justice. The General

Assembly further finds that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country. It is therefore the intent of the General Assembly that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom."

APPENDIX C-1

Section 505(a) of the Illinois Controlled Substances Act, (720 ILCS 570/505) provides:

Sec. 505 (a) The following are subject to forfeiture:

1) all substances which have been manufactured, distributed, dispensed, or possessed in violation of this Act;

2) all raw materials, products and equipment of any kind which are used, or intended for use in manufacturing, distributing, dispensing, administering or possessing any substance in violation of this Act;

3) all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession,

or concealment of property described in paragraphs 1) and 2), but:

i) no conveyance used by an person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this Section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this Act;

ii) no conveyance is subject to forfeiture under this Section by reason of any act or omisssion which the owner proves to have been committed or omitted without his knowledge or consent;

iii) a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission;

4) all money, things of value, books, records, and research products and materials including formulas, microfilm, tapes, and data which are used, or intended to be used in violation of this Act;

5) everything of value furnished, or intended to be furnished, in exchange for a substance in violation of this Act, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to commit or in any manner to facilitate any violation of this Act;

6) all real property, including any right, title, and interest (including, but not limited to, any leasehold interest or the beneficial interest in a land trust) in the whole of any lot or tract of land and any appurtenances or improvements,

which is used to intended to be used, in any manner or part, to commit, or in any manner to facilitate the commission of, any violation or act that constitutes a violation of Section 401 or 405 of this Act {720 ILCS 570/401 or 720 ILCS 570/405} or that is the proceeds of any violation or act that constitutes a violation of Section 401 or 405 of this Act {720 ILCS 570/401 or 720 ILCS 570/405}.